BOOK REVIEW

SEPARATED SPOUSES

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MAN AND WIFE IN AMERICA: A HISTORY. By Hendrik Hartog.† Cambridge: Harvard University Press. 2000. 408 pp.

INTRODUCTION

The conventional account of nineteenth-century marriage goes something like this: Couples met, and they, unlike their ancestors, married for love.[1] Men and women were transformed into husbands and wives. Husbands assumed their legally and culturally assigned role of provider and protector. In exchange for providing shelter and putting food on the table, they exacted obedience and sexual submission, and expected their wives to cheerfully birth and nurture children. Wives willingly assumed their place in the domestic sphere, submitted to their husbands' rule in exchange for their protection, and ceased having an independent legal identity.[2] But despite these rigid roles, they placed high expectations on the relationship: Wives hoped for a romantic, communicative, and fair-minded protector; husbands for a supportive, gentle, and loving companion.[3] Marriages were fundamentally stable, but as the century progressed, expectations rose, and marital instability increased as those expectations went unfulfilled.[4] Strict divorce laws, however, typically

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1. *See* text accompanying note 287-288 *infra.*
2. *See* text accompanying notes 67-71 *infra.*
3. *See* text accompanying notes 287–289 *infra.*
4. *See* text accompanying note 290 *infra.*

prevented an easy exit, so couples either resigned themselves to an unhappy life together or colluded to obtain a divorce to which they were not legally entitled.[5] The divorce rate exploded, signifying the decay of marriage as an institution.

Hendrik Hartog, in *Man and Wife in America: A History*, both challenges and informs this traditional account of nineteenth-century marriage.[6] In Hartog's account, husbands and wives did not adhere to the rigid roles prescribed by the common law. Their marriages were not fundamentally stable, as reflected in the high rate of separation. And couples did not live together or live apart based solely on the whim of a state's divorce law. Couples wishing to split exercised a variety of options, including most notably living apart without court approval. Marriage, in the end, may have been strengthened as an institution by laws that allowed spouses out of a bad marriage and into a better one.

Seamlessly weaving together a wide variety of sources,[7] Hartog constructs a compelling vision of marriage as it was understood in the nineteenth century—a publicly regulated, standardized relationship that unified husband and wife beginning with the words "I do" (or the common law equivalent)[8] and ending with the death of one spouse.[9] His work tells a story of nineteenth-century husbands and wives and the lives they made for themselves within the governing legal regime.[10] He couches his story in the language and experience

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5. *See* text accompanying notes 36-39 *infra*.

6. Hartog began this project in an earlier piece. *See* Hendrik Hartog, *Marital Exits and Marital Expectations in Nineteenth Century America*, 80 GEO. L.J. 95 (1991).

7. Hartog relies primarily on appellate cases, family law treatises, and primary sources such as trial transcripts and memoirs relating to highly publicized or hotly contested separations and divorces.

8. Common law marriage, a relationship given legal recognition despite the lack of a license and formal solemnization, played an important role throughout the nineteenth century in the state-to-state conflict over the regulation of marriage and the ease of divorce. *See* pp. 14-15. It became popular and widely accepted in the early nineteenth century, but grew weaker as the century progressed, and was eventually abolished in most states. *See* MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 64-102 (1985); *see also* Cynthia Grant Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 OR. L. REV. 709, 742-43 (1996); Ariela R. Dubler, *Governing Through Contract: Common Law Marriage in the Nineteenth Century*, 107 YALE L.J. 1885, 1888-90 (1998). Today, common law marriages are valid only in a handful of the states, though many states recognize common law marriages validly formed elsewhere. *See* Brian H. Bix, *State of the Union: The States' Interest in the Marital Status of Their Citizens*, 55 U. MIAMI L. REV. 1, 11 n.43 (2000).

9. Hartog looks at husbands and wives to understand marriage, while Nancy Cott looks at marriage from the outside. Cott, in her recent book, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION (2000), explores the connections between marriage, immigration, citizenship, equality, and theories of governance.

10. Hartog differs in his approach from many family law historians, who look at nineteenth-century marriage to explain the evolution of modern legal rules. Hartog's goal, instead, is to understand and describe marriage as it was experienced by men and women of that era.

of separation,[11] an aspect of the history of marriage that has been undervalued. His focus on separation exposes a weakness in the conventional account in its failure to consider non-legal marital exits and its concomitant overstatement of the extent to which divorce law controlled social relationships.

Hartog explores separation from 1790 to 1950, though the focus is the pre-1870 period. Throughout, he emphasizes neither the abstract governing law, nor the private emotions and values, but their points of intersection. His skillful illustration of how law sometimes shaped private marriages, but more often bent to accommodate them even at the expense of theoretical purity, makes this book a uniquely valuable contribution to the historiography of marriage.[12]

This review is comprised of three parts, reflecting the three marital statuses informed by Hartog's exploration of separation: intact marriage, separation, and remarriage. Part I explains Hartog's contribution to our understanding of intact marriages—married couples living together. Separation turns out to be an important source of evidence about marital rights, duties, and expectations, for only when a couple separates does legally enforcing them become possible or important. Through an examination of cases involving separate estates and prenuptial agreements, suits to enforce separation agreements, and suits for separation or divorce, he draws a picture of nineteenth-century marriage that reconsiders notions of transformation, unity, and coercion as experienced by ordinary husbands and wives. Courts, he concludes, did not require unforgiving adherence to the legally prescribed roles as the conventional account might suggest. Couples, instead, were governed by a kinder, gentler coverture, one that accommodated the realistic needs of women to retain legal identity in some circumstances, and be protected from coercion in others.

In this Part, I suggest that the formal principle of marital unity nonetheless mattered because it was used to determine women's rights in other contexts. I also explore, drawing primarily on a study of divorce records from Alameda County, California,[13] whether the availability of divorce on grounds of cruelty placed additional limits on husbandly coercion.

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11. Hartog describes himself in the introduction as "fixated on separation." P. 1.

12. For other important contributions to this historiography, see generally NORMA BASCH, IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN NINETEENTH-CENTURY NEW YORK (1982); COTT, *supra* note 9; GROSSBERG, *supra* note 8; AMY DRU STANLEY, FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION (1998); Hartog, *supra* note 6; Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996) [hereinafter Siegel, *Rule of Love*]; Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880*, 103 YALE L.J. 1073 (1994) [hereinafter Siegel, *Home as Work*]; Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860-1930*, 82 GEO. L.J. 2127 (1994) [hereinafter Siegel, *Marital Status Law*].

13. Throughout this review, there are references to a study of divorce records in Alameda County, California. The study, conducted by Chris Guthrie and Joanna Grossman,

Part II explores separation as a marital status: couples who were legally married but living apart. Separation is an important indicator of marital instability, and its prevalence in the nineteenth century calls into question the conventional assumption of marital stability. Separation, a category that encompasses couples living apart lawfully (by order of a court) and unlawfully (by simple separation), has also been underexamined as a status by other historians, who have focused on divorce law as the primary means of regulating private relationships and the primary indicator of marital failure. Separation was a defining facet of nineteenth-century life, and served as more than a transition to or substitute for divorce. It was instead, Hartog argues, the desired end for couples who valued marriage as a lifelong commitment, but could not live within its day-to-day constraints. This description is in stark contrast to the modern sense of separation as a prelude to divorce. But Hartog's work suggests not only a nineteenth-century preference for separation over divorce, but also one for informal over formal separation.

These claims need to be substantiated with further research. This review briefly examines the legal and practical availability of divorce, and the relative consequences of absolute divorce, legal separation, and informal separation in order to begin the project of assessing Hartog's claims. Much of the focus in this Part is on why women would prefer informal separation, when that status gave them the least in terms of financial security and emotional fulfillment. This section also considers how separation changes the conventional understanding about the relationship between divorce law and marital stability.

Part III looks at a third marital status: remarriage (legal or otherwise). Separation and the law's treatment of it illustrate the importance of marriage—and remarriage—to ordinary men and women. Hartog describes a system that, although premised on the fundamental importance of marriage and its permanence, did not force couples by and large to stay married. The actions of courts, legislators, and individuals instead intersected to preserve marriages that were viable, but to permit exit and remarriage where they were not. Courts took on a marriage-saving function, which differed from the approach in previous centuries in that they did not insist on saving first marriages. The social importance of marriage influenced law, both through the enactment of statutes permitting remarriage and the lax enforcement of statutes, like those against bigamy, preventing it. Hartog's research provides a way to reconcile the nineteenth century's growing separation and divorce rate with the continuing strength of the ideal of marriage.

In this Part, I consider why marriage continued to be important for individuals, particularly women, who often traded aspects of freedom for marriage.

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is based on a 20% random sample of all divorce cases filed between 1890 and 1910 in that county. The study is on file with the author [hereinafter Grossman & Guthrie, *Alameda County Study*].

I. STATUS ONE: MARRIED (AND LIVING TOGETHER)

Nineteenth-century marriage implicates several different "histories:" a social and economic history that explains its role in relationship to work, childrearing, and community relationships; a political history that relates it to political participation, community governance, or women's quest for equality; and a psychological or literary history that sheds light on the relevance of romantic love and individual fulfillment to marriage.[14] But it also has a legal history, not just an arid description of the statutes labeled "Marriage and Divorce," but a vibrant, rich history that captures the role of law—both as received and as practiced—in regulating relationships, and the myriad ways in which husbands and wives navigated through and around legal norms and mandates. It is to that complex history that Hartog contributes.

A. *Methodology*

Marriage is more than a legal status, and using legal documents to explain it is vulnerable to criticism. But law was important to married couples for "beginnings and endings:"[15] when they entered into marriage, when they attempted (usually unsuccessfully) to individualize its terms, when they informally separated, or when they took their marital conflicts to state courts across the country. Hartog anticipates and ably responds to the critique that legal documents do not reveal anything about how real men and women conducted their lives and their marriages. He rejects the "conception of a 'realer' self, unrevealed in legal texts."[16] Regardless of whether husbands and wives came to court voluntarily or under coercion, he argues, the stances they took there revealed "who they were, in their legal dealings and identities," though "other presentations and performances, occurred elsewhere."[17]

The notion that legal documents constructed at the end of a marriage can provide insight into the marriage itself is important (though not new), for a purely non-legal history of marriage is surely incomplete. Letters, diaries, journals, and memoirs from the nineteenth century are restricted to the elite classes.[18] Prescriptive literature about the proper way to conduct a marriage, for example, is of limited value without some evidence that the prescribed

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14. *See* p. 2 (acknowledging the existence of aspects of "nineteenth-century marriages more deeply private, less strategic, more intensely religious or intimate, hidden from law, yet definitive of marriage").

15. P. 24.

16. P. 3 n.4.

17. *Id.* Nancy Cott makes a similar point, noting that "[r]eading the legal record for cultural and social insights need not conflict with awareness that the law represents coercive power." COTT, *supra* note 9, at 8.

18. *See, e.g.*, ROBERT L. GRISWOLD, FAMILY AND DIVORCE IN CALIFORNIA, 1850-1890: VICTORIAN ILLUSIONS AND EVERYDAY REALITIES 2 (1982).

ideals actually affected human behavior.[19] Legal materials elucidating the rights and duties couples tried to enforce, what breaches of conduct might have led them to seek an "early exit,"[20] and what remedies they sought and received from local courts are, then, an important addition to this picture.

To construct his legal history of marriage, Hartog relies on a comprehensive compilation of appellate cases from the notoriously strict New York and the notoriously liberal California, nineteenth-century commentary on the law of husband and wife (regulating the ongoing marriage) and the law of marriage, divorce, and separation (regulating marriage's beginning and end), and trial transcripts in highly publicized, usually scandalous cases.[21]

Each of his sources provides a unique piece to the puzzle of marriage. Appellate cases reflect judicial norms and limn boundaries within which married couples functioned.[22] They also control to a significant extent the dialogue of marriage and its dissolution, as lawyers and litigants incorporate the language and standards of appellate courts in framing subsequent cases.[23] Treatises played both a positive and normative role in law and its development. They ostensibly describe or restate the law as developed by courts and legislatures, but also sometimes describe the law as it ought to be, in an effort to influence decisionmakers.[24] Hartog also makes use of exceptional cases to illustrate his descriptions of marriage law and behavior. These cases not only give nineteenth-century marriage a human face, but also provide a running reminder that the proper focus is not law in the abstract, but law as it affected

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19. There are obvious flaws in using prescriptive literature to draw conclusions about actual behavior. *See, e.g.*, *id.* at 3 n.8 (collecting authorities).

20. This is Hartog's term for an end to marriage brought about by something other than death. P. 63.

21. P. 315. He also refers occasionally to trial pamphlets in these exceptional cases. Pamphlets—a tool of the rich litigant in the nineteenth century—were privately published documents dramatizing the "cast of characters" and the marital dispute. *See* NORMA BASCH, FRAMING AMERICAN DIVORCE: FROM THE REVOLUTIONARY GENERATION TO THE VICTORIANS 143, 147-85 (1999) (analyzing mid-century divorce through an examination of pamphlets). Pamphlets were common in cases that most captured the public imagination—where a husband murdered his wife's lover. One such case involved Daniel Sickles, a member of Congress, who murdered his wife's lover, Philip Barton Key, the son of Francis Scott Key. Sickles published a pamphlet, reproducing for the public his lawyer's opening and closing speeches to the jury. P. 220.

22. Appellate cases also have the virtue of being available to any scholar, who may look at them and draw different conclusions. *See* Gary Schwartz, *The Character of Early American Tort Law*, 36 UCLA L. REV. 641, 645 n.14 (1989). *But see* G. Edward White, *The Appellate Opinion as Historical Source Material*, 1 J. INTERDISC. HIST. 491 (1971) (discussing drawbacks of using appellate cases in historical research).

23. *See* note 34 *infra*.

24. Hartog aptly illustrates this normative function in the marriage context. James Kent, author of the well-known COMMENTARIES ON AMERICAN LAW (1826), and Tapping Reeve, author of an influential treatise, THE LAW OF BARON AND FEMME (1816), insisted that separate maintenance agreements were enforceable, despite the fact that the law was clearly to the contrary. Pp. 80–81.

real men and women.[25] They also are some evidence of the ways in which the prescribed law of marriage, separation, and divorce bent to accommodate real people amidst domestic turmoil.

Hartog does not use local trial records in cases of separation or divorce, but suggests that as an area of future research.[26] An examination of trial records in divorce and separation cases would enable other researchers not only to test Hartog's claims, but also to fill in the gaps. Trial records provide important information about the legal system that appellate cases miss. In the context of divorce or separation, for example, they reveal what percentage of petitions were denied, dismissed, or granted and on what grounds, how long the process took, how long couples had been married before splitting up, how many petitions were filed by women, the demographic profile of litigants, and the results obtained in terms of custody, child support, alimony, and property division. From those numbers, one may draw inferences about the relative benefits of separation versus divorce and the deterrents to seeking formal recognition of marital breakup.[27]

Trial court records in both divorce and separation cases can also be used to understand marriage itself. Prior to the no-fault revolution beginning in the late 1960s, all states insisted that divorce be, at least in form, an adversarial process.[28] A divorce was a remedy granted to an innocent party who could prove she had been wronged on one of the grounds recognized by the state.[29] The prohibition of consensual divorce had two consequences. First, a divorce

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25. Many modern family law historians have recognized the value of closely examining highly publicized or exceptional cases. *See, e.g.*, MICHAEL GROSSBERG, A JUDGMENT FOR SOLOMON: THE D'HAUTEVILLE CASE AND LEGAL EXPERIENCE IN ANTEBELLUM AMERICA (1996) (examining a single contested custody case from the nineteenth century to illustrate social and legal culture); *see also* Ariela R. Dubler, *Wifely Behavior: A Legal History of Acting Married*, 100 COLUM. L. REV. 957, 976 nn.74-76 (2000) (collecting examples of historians using particular cases to illuminate cultural meaning in the nineteenth century).

26. P. 316.

27. *See* text accompanying notes 231-243 *infra*.

28. *See* Lawrence M. Friedman, *Rights of Passage: Divorce Law in Historical Perspective*, 63 OR. L. REV. 649, 653 (1984).

29. Innocence was policed by the typical defenses to a claim of divorce. *See, e.g.*, CAL. CIV. CODE § 122 (Hart 1889) (listing defenses). Recrimination was a defense that accused the filing party of also committing grounds for divorce. Condonation occurred when the innocent party continued to live with the guilty party after learning of marital misconduct. P. 66 (noting that divorce required proof that "one spouse, and one spouse only, had fundamentally breached his or her obligations as a spouse"); pp. 68-69 (describing the case of Jane and Peter Williamson, who were condemned to a lifelong marriage because his adultery was cancelled out by her remarriage—and thus her adultery as well). Connivance involves consent to the commission of the conduct constituting grounds for divorce. Proof of recrimination, condonation, or connivance, in many states, deprived the court of discretion to grant a divorce. *See, e.g.*, CAL. CIV. CODE § 122 (Hart 1889). Nancy Cott argues that innocence was enforced more stringently for female plaintiffs whom courts required prove conformity with role expectations. *See* COTT, *supra* note 9, at 49.

could not be granted by default when one party failed to appear;[30] the plaintiff in such a case still had to present evidence of the grounds alleged.[31] Second, even where defendants did appear, a court could not grant a divorce based solely on an uncorroborated confession of the defending spouse.[32] Consequently, most trial records contain a detailed complaint setting forth the alleged wrongs as well as testimony of at least one witness corroborating the allegations. The conduct that leads spouses to seek a divorce or separation reveals something about the expectations they held for marriage. As Nancy Cott has explained:

> The causes that gave rise to divorce petitions should show the boundaries of normal marital expectations, just as actions construed as criminal indicate societal limits. And while the defendants' behavior threatened accepted norms, the petitioners and the deponents—who supplied almost all of the information in the records—preserved them. There seems every reason to accept the portrayal of domestic life and social surroundings in the divorce records as valid, while maintaining caution about possible distortions introduced by the defendants' behavior.[33]

Trial records, however, are not without limitations. On the one hand, allegations may be stronger than the real facts because parties want to ensure that the divorce will be granted. And lawyers tend to be risk averse; they are likely to characterize the facts in a way they know will be accepted by a court.[34] This may result in exaggerated depictions of marital strife, calculated to justify the requested divorce. On the other hand, parties may understate the allegations in order to hide embarrassing, private facts from the public eye. Fear of publicity was probably justified. Divorce was uncommon enough throughout the nineteenth century that local newspapers kept tabs on them. The *Oakland Tribune*, for example, had a weekly column at the turn of the last century called "The Divorce Mill," in which it reported on the filing and granting of divorce petitions.[35]

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30. *Cf.* Grossman & Guthrie, *Alameda County Study*, *supra* note 13 (finding that only 28% of divorce defendants appeared in court); GRISWOLD, *supra* note 18, at 189 n.12 (finding that 30% of divorce defendants appeared in court).

31. *See, e.g.*, CAL. CIV. CODE § 130 (Hart 1889) (providing that "no divorce can be granted upon the default of the defendant, or upon the uncorroborated statement, admission or testimony of the parties . . . but the court must, in addition . . . require proof of the facts alleged").

32. *Id.*

33. Nancy F. Cott, *Eighteenth-Century Family and Social Life Revealed in Massachusetts Divorce Records*, 10 J. SOC. HIST. 20, 21 (1976); *see also* GRISWOLD, *supra* note 18, at 21-23.

34. P. 27 ("Lawyers' predictions led husbands and wives to assume identities recognizable in the law, to make themselves into legal subjects. . . . Predictions about how a court would react also led litigants to impose identities on their opponents."). This tendency is certainly reflected in the widespread evidence of collusive divorce, where couples constructed the whole story of marital strife for the court. *See* text accompanying note 246 *infra*.

35. *See, e.g., The Divorce Mill: The Domestic Troubles of Unhappy Couples Aired in*

The most worrisome concern about relying upon divorce records is the problem of collusion. By all accounts, nineteenth-century divorce cases were plagued by collusion.[36] Despite explicit prohibitions under state law[37] and the requirement that grounds for divorce be proven and corroborated,[38] consensual divorce was quite common. Although the pervasiveness of collusion ultimately spurred significant changes in divorce law,[39] its prevalence in the nineteenth century limits the strength of the conclusions that can be drawn from court testimony and records about the real marital behavior underlying the petitions for divorce.

There are an assortment of useful studies of divorce using trial court records,[40] which can be used to examine discrete aspects of Hartog's work. Some very preliminary testing based on those studies is done in this review,[41]

Court, OAKLAND DAILY EVENING TRIB., July 21, 1890, at 8 (reporting that the "usual number [5] of divorce cases were heard in court this morning"). Newspapers reported on individual cases as well. *See, e.g.*, *Gave Up Her Home to Shine on the Stage*, OAKLAND TRIB., Jan. 2, 1900, at 8 (reporting that Emma Sutter's "ambition overcame her love for her husband," causing her to abandon him and move to New York).

36. *See* p. 22 ("Perjury, collusion, fiction were all crucial parts of divorce practice."); *see also* J. HERBIE DIFONZO, BENEATH THE FAULT LINE: THE POPULAR AND LEGAL CULTURE OF DIVORCE IN TWENTIETH-CENTURY AMERICA 111 (1997) (observing that fault was "less a barrier and more a tunnel for divorce"); Katharine T. Bartlett, *Saving the Family from the Reformers*, 31 U.C. DAVIS L. REV. 809, 826-27 (1998) ("The practice of collusive divorce is well-documented in earlier fault-based divorce regimes."); Lawrence M. Friedman, *A Dead Language: Divorce Law and Practice Before No-Fault*, 86 VA. L. REV. 1497, 1504 (2000) ("The divorce laws in practice had almost nothing in common with the divorce laws on the books."); Friedman, *supra* note 28, at 659 (concluding that the "basic change [in the late nineteenth century] was the rise of consensual divorce . . . in the teeth of statutes that refused to admit that such a thing was legally possible"); Lawrence M. Friedman & Robert V. Percival, *Who Sues for Divorce? From Fault Through Fiction to Freedom*, 5 J. LEGAL STUD. 61, 65 (1976) (noting that collusion "was the norm before the end of the nineteenth century"). Local newspapers sometimes reported on collusive divorces. *See, e.g.*, *Strong Evidence of Collusion*, OAKLAND TRIB., Nov. 14, 1980, at 1 (reporting that Ada and Sherman Phillips were denied a divorce because the court suspected collusion).

37. Evidence of collusion typically deprived courts of discretion to grant a divorce. *See, e.g.*, IOWA CODE ch. 65, § 4 (1843); ME. REV. STAT. tit. V, § 18 (1871); MICH. COMP. LAWS § 6232 (Howell 1890).

38. New York, for example, had only one ground for divorce—adultery—and required proof of it. Friedman & Percival, *supra* note 36, at 65.

39. *See* text accompanying note 249 *infra*.

40. *See, e.g.*, BASCH, *supra* note 21 (studying court records in New York and Indiana); GRISWOLD, *supra* note 18 (studying court records in California); ELAINE TYLER MAY, GREAT EXPECTATIONS: MARRIAGE AND DIVORCE IN POST-VICTORIAN AMERICA (1980) (studying court records in New Jersey and California); Cott, *supra* note 33 (studying divorce records in Massachusetts); Friedman, *supra* note 36 (studying divorce records in California); Grossman & Guthrie, *Alameda County Study*, *supra* note 13 (studying court records in California). Trial records have also been useful in studies of other aspects of nineteenth-century family law. *See, e.g.*, Richard H. Chused, *Married Women's Property Law: 1800-1850*, 71 GEO. L.J. 1359 (1983) (using court records to explain early developments in married women's property law).

41. The data from Grossman & Guthrie, *Alameda County Study*, *supra* note 13, is used

but a great deal more is necessary. And there have been almost no similar studies of separation cases.[42] Hartog makes a compelling case that separation is integral to any understanding of marriage, and empirical studies of nineteenth-century separations would be a natural complement to his research.

B. *Separation and the Development of the Law of Marriage*

The law of separation and marriage was—and is today—determined, by and large, by state courts interpreting state law.[43] Until 1858, couples had at least a theoretical possibility of having their domestic relations cases heard in federal court based on diversity jurisdiction—if they could successfully establish that the spouses were not residents of the same state. But in 1858, the Supreme Court heard *Barber v. Barber*,[44] a case in which the practical constraints on that jurisdictional right came to light. When Mrs. Barber went to court, wives faced one obstacle to federal jurisdiction; when she left, they faced two.

In *Barber*, a New York wife got an order awarding her separate maintenance from her abandoning, but still lawfully wedded husband.[45] He subsequently divorced her in Wisconsin, his new home.[46] She followed him and tried unsuccessfully to enforce her New York order of support in Wisconsin state court.[47] When she failed, she went to federal court.

One of the basic principles of coverture—the idea that a woman's *legal* existence is covered over by her husband's during marriage[48]—posed a roadblock to her suit in federal court. Married women, according to that principle, were legally domiciled with their husbands, regardless of whether they lived in the same place.[49] The catch-22 for Mrs. Barber was this: If she

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for this purpose.

42. One exception is a study of eighteenth-century newspaper advertisements placed by husbands or wives notifying the community of a separation. *See* HERMAN R. LANTZ, MARITAL INCOMPATIBILITY AND SOCIAL CHANGE IN EARLY AMERICA 15-27 (1976). This study is valuable primarily because it cautions against equating the rate of marital incompatibility or dissatisfaction with the divorce rate. Lawrence Stone has studied separations in England. *See* LAWRENCE STONE, ROAD TO DIVORCE: ENGLAND 1530-1987, at 149-228 (1995).

43. One notable exception is the recent passage by Congress of the Defense of Marriage Act which defines marriage for the purpose of federal law to mean "heterosexual marriage," and gives states license under the Full Faith and Credit Act not to honor a same-sex marriage solemnized in another state. Pub. L. No. 104-199 (Sept. 21, 1996), codified at 28 U.S.C. § 1738C (2000) and 1 U.S.C. § 7 (2000).

44. 62 U.S. (1 How.) 582 (1858).

45. *Id.* at 583-84.

46. *Id.* at 584.

47. *Id.*

48. The disabilities of coverture are explained in the text accompanying notes 70-71 *infra*.

49. Pp. 22, 33. The legal rules of domicile, combined with newfound American

was still married, her domicile was the same as her husband's and she could not seek to establish diversity jurisdiction; if she was divorced, her order of separate maintenance could no longer be enforced. The Supreme Court ignored the technical niceties in that case, awarding Mrs. Barber the unusual status of being a separated wife with her own domicile.[50]

But the Court in *Barber* also announced, albeit in dicta, that domestic relations matters should be relegated to state courts. Because the particular claim in *Barber*—that the Court should enforce an existing order of alimony—did not qualify as such a matter, the Court was able to exercise jurisdiction.[51] That dicta marked the beginning of the so-called "domestic relations exception" to diversity jurisdiction, which prevents parties from filing petitions for separation, divorce, or custody in federal court. To this day, although wives can be domiciled apart from their husbands,[52] federal diversity jurisdiction cannot be established in a domestic relations case.[53] Thus the law of marriage was (and is) relegated to state courts.

State courts do not, however, take on marriage directly. They speak to it, instead, primarily through cases involving separation. The book begins with a discussion of *McGuire v. McGuire*,[54] a paradigmatic case in American family law. Lydia McGuire, a woman who lived in abject poverty due to her husband's miserliness, sought the assistance of a Nebraska court in enforcing his duty of support—one of the longstanding duties ascribed to husbands.[55] The Court refused her request on the grounds that she and her husband had not separated. An intact marriage—whether blissful or not—was, for the most part, a private, law-free zone.[56] Were she separated, the Court undoubtedly would

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mobility, caused other problems for married women. Separated wives could only sue for support where they were domiciled and could only apply for poor relief from their husbands' settlements. Thus, a woman who was abandoned—and whose domicile followed the abandoning husband—had to move to his locale in order to make use of these rights. That was an impossibility for most of them. Pp. 23, 128.

50. Pp. 33-35.

51. *Barber*, 62 U.S. at 591 (Federal jurisdiction is "limited to cases in which alimony has been decreed.").

52. *See, e.g.*, O.G.C.A. § 19-2-3 (2000) (The "domicile of a married person shall not be presumed to be the domicile of that person's spouse."); *see also* pp. 309-10 ("In the 1970s and 1980s, legislative drafting offices worked to remove gendered language from the statutory law of marriage. Domiciles belonged to individuals.").

53. *See* Ankenbrandt v. Richards, 504 U.S. 689, 694-95 (1992) (dicta).

54. 59 N.W.2d 336 (Neb. 1953).

55. *Id.* at 338.

56. Pp. 10-11. The refusal to intervene in an "intact" marriage was not absolute. Early on, courts stepped in to prevent wives and children from becoming public burdens or to alleviate moral outrage. Pp. 24-25. Moral outrage might be spurred by physical abuse or forced prostitution, or any other conduct that thrust "private" discord into the public's view. P. 25 ("[S]o long as the marital unit did not become a burden on public welfare and so long as moral failures within the family did not come to public consciousness, for so long the family would remain private, untouched (but not untouchable) by public power."); *see also* ELIZABETH PLECK, DOMESTIC TYRANNY: THE MAKING OF SOCIAL POLICY AGAINST FAMILY

have stepped in, as courts "often recognized the need for remedies in a world where separated and ex-wives would otherwise find themselves without support and, often, without the means of earning an adequate living."[57]

The reluctance to intervene into existing marriages persists today, though less absolutely. On the one hand, courts issue restraining orders to stop spousal abuse, even where the spouses continue to cohabit.[58] On the other hand, courts categorically refuse to enforce prenuptial agreements that purport to regulate the day-to-day relationship of a married couple.[59] This abstention reflects similar concerns about institutional competence to fashion appropriate remedies and the conflict with family autonomy inherent in doing so.[60]

McGuire illustrates the importance of separation to the legal history of marriage. Suits brought by separated spouses were central to the development of family law, as courts only had occasion to consider spousal rights and duties (and whether they had been fulfilled or breached) once a couple had separated. Those cases provide important insights into the legal expectations forming the backdrop for typical nineteenth-century marriages.

Separation cases were also important to the development of women's rights law. Separated wives brought suits to enable them to own property, run

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VIOLENCE FROM COLONIAL TIMES TO THE PRESENT (1987).

57. P. 10.

58. *See, e.g.*, N.Y. FAM. CT. ACT § 842 (McKinney 2001) (distinguishing between two types of protection orders: "stay away" orders that preclude cohabitation and "do not harass" orders that permit it).

59. *See, e.g.*, *In re* Marriage of Mathiasen, 219 Cal. App. 3d 1428 (1990) (refusing to enforce agreement regulating financial support during marriage); Favrot v. Barnes, 332 So. 2d 873 (La. 1976) (refusing to enforce agreement limiting sexual intercourse to once a week); *see also* James Herbie DiFonzo, *Customized Marriage*, 75 IND. L.J. 875, 935 (2000) ("Courts have to date only infrequently considered—and generally declined to enforce—prenuptial agreements regulating the parties' behavior during marriage . . . ."); Laura P. Graham, *The Uniform Premarital Agreement Act and Modern Social Policy: The Enforceability of Premarital Agreements Regulating the Ongoing Marriage*, 28 WAKE FOREST L. REV. 1037, 1043 (1993) (explaining that courts refuse to enforce agreements about an ongoing marriage because to do so "would increase conflict between the parties, present severe enforcement problems, and frustrate judicial economy"); Judith T. Younger, *Perspectives on Antenuptial Agreements: An Update*, 8 J. AM. ACAD. MATRIMONIAL L. 1, 8 (1992). The Uniform Premarital Agreement Act purports to sanction agreements regulating any aspect of marriage, including "personal rights and obligations." 9B U.L.A. 373 (1987 & Supp. 1999). But although the Uniform Act has been adopted in half the states, *see id.* at 369, there is no discernible trend toward greater enforcement of agreements regulating the ongoing marriage. *See* Graham, *supra*, at 1057-63 (suggesting that although courts have greater justification and authority for enforcing such agreements today, they are not being regularly enforced). In contrast, agreements regarding the financial consequences of death or divorce are increasingly likely to be enforced. Prenuptial agreements regulating the post-marriage relationship do not implicate most of the concerns raised by those regulating an ongoing marriage.

60. *See* DiFonzo, *supra* note 59, at 935; Graham, *supra* note 59, at 1057. One exception to this abstention is the law of covenant marriage, *see* text accompanying notes 252–256 *supra*, which calls for enforcement of a premarital commitment to seek counseling prior to obtaining a separation or divorce. *See, e.g.*, LA. REV. STAT. § 9:273, 307 (2000).

businesses, and make contracts—that is, to act like single women. These rights, eventually codified as married women's property acts in almost every state, were tremendously important to the progression toward equality for women.[61] Hartog describes them as "institutionally realistic efforts to deal with the situation of separated wives, who remained otherwise in the law in a state of coverture, subject to their absent husbands and without the legal capacity to contract or act in this world."[62] But the rights these acts protected were first sought—and sometimes obtained—in court by separated wives.

But separation cases are not the only context in which courts enforced marital duties and rights. Cases involving common law marriage were also important to understanding the rights and duties of husbands and wives. As Ariela Dubler points out, the typical common law marriage case in the nineteenth century involved a woman trying to claim a portion of her deceased partner's estate. To succeed, she had to prove that she acted like a wife and should therefore be treated like one for purposes of inheritance. What sufficed as "wifely behavior" before nineteenth-century courts provides further evidence about role expectations for nineteenth-century marriage.[63]

Criminal law also played a role, particularly during the Progressive Era when "crimes against morality" filled the statute books. Those laws criminalized offenses against the family, such as abandonment, neglect, adultery, and bigamy.[64] Where a spouse, typically a husband, was prosecuted

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61. Historians disagree about whether married women's property acts were the product of women's rights advocacy, but not about whether they were important to achieving women's rights. *See, e.g.*, LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 210 (2d ed. 1985) ("[T]he real fulcrum of change was outside the family and outside the women's movement. It lay in the mass ownership of property, in the increased activity of women in managing property, and in the felt needs of an active land market."); JOAN HOFF, LAW, GENDER AND INJUSTICE: A LEGAL HISTORY OF U.S. WOMEN 134 (1991) ("Women reformers were only marginally involved . . . in the passage of the Married Women's Property Acts in the 1830s and 1840s."); Chused, *supra* note 40, at 1400 (1983) ("Although it is difficult to argue that lobbying or petitioning by women or their supporters led directly to the passage of most of the debt statutes, the legal and cultural developments of the first third of the century certainly created a more sympathetic environment for their enactment."); COTT, *supra* note 9, at 52 (stating that the acts "had less to do with concerns for women's rights than with worries about the economic relations between men and the property interests of male-headed families"); Siegel, *Marital Status Law*, *supra* note 12, at 2137 (arguing there is "abundant evidence that the lobbying and petitioning campaigns of the nineteenth-century woman's rights movement precipitated the enactment of numerous statutes modifying incidents of marital status law.").

62. P. 33. *See also* Chused, *supra* note 40.

63. *See* Dubler, *supra* note 25, at 974-94.

64. Lawrence M. Friedman & Paul Tabor, *A Pacific Rim: Crime and Punishment in Santa Clara County, 1922*, 10 LAW & HIST. REV. 131, 148 (1992) (describing cases from criminal docket that involved "crimes against family relations"). Just as it was a crime for married individuals to pretend they were unmarried, by neglecting their spouses or having extramarital relationships, it was a crime for unmarried individuals to act married. Dubler, *supra* note 25, at 958-59 (discussing prosecution of a couple in 1886 for the crime of acting married). Many states criminalized offenses such as fornication (sexual relations with an

for abandonment, the sentence might be an order requiring him to return home.[65] The crime of spousal neglect might be punished by an order garnishing the offender's wages to ensure adequate support. Although many of these prosecutions were never completed,[66] the attempt to enforce crimes against the family is further evidence of customary marital obligations.

C. *Aspects of Marriage*

1. *Transformation and unity.*

The conventional *legal* understanding of nineteenth-century marriage is primarily a story about the dutiful performance by husbands and wives of legally prescribed duties in exchange for legally assigned rights. These duties were embodied in the extremely influential *Blackstone's Commentaries* on the law of husband and wife,[67] as well as other treatises,[68] and were recited by courts with schoolboy mimicry.[69]

Men, for their part, had a duty to support wives and children, a duty to refrain from immoderate physical and mental abuse, and a duty to remain sober, faithful, and law-abiding. Women had the right to insist that those duties be fulfilled. Men also had the right to choose a family religion and domicile.

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unmarried partner) and bastardy (fathering a child out of wedlock). *See, e.g.*, WIS. CRIM. CODE, ch. 351 (1923).

65. This information comes from an empirical study conducted by the author of all criminal cases in Dane County, Wisconsin, in 1922. The data is on file with the author [hereinafter Grossman, *Dane County Study*].

66. *See* Friedman & Tabor, *supra* note 64, at 148-49 ("Probably the motive behind these prosecutions was not punishment, but coercion; these cases were brought to force a father to support his child. When the screws were turned, he may have submitted, and the cases were then quietly dropped.").

67. William Blackstone's COMMENTARIES ON THE LAW, first published in 1765, were edited and republished in each of several generations.

68. *See, e.g.*, KENT, *supra* note 24; REEVE, *supra* note 24.

69. *See, e.g.*, Coleman v. Burr, 93 N.Y. 17 (1883), (reciting the duties of husband and wife in the context of interpreting a married women's property act).

> It was not their purpose, however, to absolve a married woman from the duties which she owes to her husband, to render him service in his household, to care for him and their common children with dutiful affection when he or they need her care, and to render all the services in her household which are commonly expected of a married woman, according to her station in life. Nor was it the purpose of the statute to absolve her from due obedience and submission to her husband as head and master of the household, or to depose him from the headship of his family, which the common law gave him. He still remains liable to support and protect his wife and responsible to society for the good order and decency of his household. He is to determine where he and his family shall have a domicile, how his household shall be regulated and managed, and who shall be members of his family.

Id. at 24. These deeply entrenched rights and duties were also reflected in the laws of divorce, which made, in many instances, the failure to fulfill marital duties grounds for the permanent dissolution of marriage. *See* text accompanying notes 194-206 *infra*.

Women, for their part, had a duty to give birth to, nurture, and educate children, a duty to maintain the home (and hearth), a duty to submit to reasonable sexual demands, and a commensurate duty to remain sober, faithful, and law-abiding. Men, in turn, had the right to insist on the performance of these duties.

Married women lacked a unique legal existence; the principle of marital unity dictated that a man and wife merged into a single entity upon marriage (namely, the husband). Thus, superimposed over every marriage was also the law of coverture—the set of rules and disabilities flowing from the principle of unity.[70] A married, or covered, woman lacked the legal capacity to enter into contracts, to own, sell, or exchange property, to keep any income she earned, to maintain her own domicile, or to sue and be sued. Coverture had consequences for husbands, too. Husbands could be sued to recover the cost of necessaries given to their wives on credit, [71] and they could be held criminally responsible for certain crimes committed by their wives. Because they were responsible for their wives' actions, husbands also, at least in theory, had a right of "moderate correction."

But Hartog uses materials and cases on separation to analyze how the legal norms embodied in unity and coverture translated into everyday marriages—whether those formulaic standards affected how ordinary husbands and wives understood their roles and carried out their marital relationships.

The disabilities of coverture, Hartog argues, were less onerous than treatises and courts suggested.[72] Wife-beating is a good example. Marital unity was often raised as a defense to a charge of wife-beating, on the theory that because the husband and wife comprised a single entity the wife-beater was only beating himself up. In one colorful case, the defendant-husband took that position, which was pitted against the prosecution's theory that stabbing one's wife had never been considered suicide.[73] Although that case never resulted in a ruling, since the couple reunited, it is illustrative of a common refusal by courts to accept unity as a defense to wife-beating. Unity, it was said, was a principle designed to protect the wife, not the husband, leading the judge in a fictionalized divorce case to note: "If any ill the wife hath done, The man is fin'd—for they are one; If any crime the man doth do, Still he is fin'd for they are two."[74] Likewise, Hartog argues, the common law right of

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70. *Cf.* COTT, *supra* note 9, at 10 (describing unity as the most important aspect of marriage in a "broadly shared understanding of the essentials of the institution").

71. The potential for suits by third parties is one possible limitation on the *McGuire* principal that the husband's duty of support would not be enforced if the parties were cohabiting. *See* text accompanying notes 55-57 *supra*.

72. Hartog makes an interesting point about the origins of coverture. In English law, the doctrine was narrow in that it dealt only with ownership of property, not the identities of husbands and wives, and applied only in royal courts. And, at the time American courts borrowed it, it was evolving into perhaps an even narrower doctrine. But American courts excised the frozen doctrine and proceeded to apply it much more expansively. Pp. 118-19.

73. Pp. 103-04.

74. P. 104.

husbands to physically correct or chastise their wives for misbehavior was never fully incorporated into American law.[75]

Another point of departure from the theoretical principle of unity came in the context of separate estates.[76] One dictated consequence of coverture was that a woman's husband automatically assumed control of her premarital property. It was not uncommon, however, for propertied spouses to enter into an arrangement to permit the wife to retain a "separate estate."[77] Separate estates first were created exclusively by trust and designed to protect some money for the wife from her husband's creditors (and his profligacy). A father, for example, would put money in trust for his daughter, giving a trustee exclusive control over the property. But by the seventeenth century, trusts often gave the beneficiary-wives the power to control the assets. And by the end of the eighteenth century, husbands and wives began to create separate estates by contract.

Separate estates were anathema to the principles of coverture, yet courts of equity consistently legitimated them.[78] The ad hoc decisions of courts of equity that allowed women some control over property were codified in waves by the Married Women's Property Acts, a series of state statutes that formally lifted the property-related disabilities of coverture. The first wave simply protected women's premarital property from their husbands' creditors, the same practice previously sanctioned by courts of equity.[79] Later statutes first gave women the ability to manage and dispose of their property, and gave them control over their own earnings.[80]

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75. P. 105; p. 151 (arguing that the right to regulate the household was not an open-ended or "unquestioned right"). Reva Siegel argues that although the right of chastisement was repudiated under marital status law, it was ultimately sustained by the doctrine of marital privacy. Thus, she contends, although nineteenth-century courts did not articulate wife-beating as a "right," they gave effect to it as such by refusing to interfere in the relationship between husband and wife. *See* Siegel, *Rule of Love*, *supra* note 12, at 2154–2161.

76. Norma Basch suggests an additional respect in which the strict rules of coverture were not enforced: "Despite the constraints of coverture, the notion that the gifts or dowry a wife brought to the marriage should return to her with its dissolution seemed to enjoy broad currency, even in advance of the married women's property acts." Norma Basch, *Relief in the Premises: Divorce as a Woman's Remedy in New York and Indiana, 1815-1870*, 8 LAW & HIST. REV. 1, 9 (1990).

77. P. 172. Only wives who came to the marriage with separate property could benefit from a separate use or trust agreement. For an interesting history of early marriage settlements, see LLOYD BONFIELD, MARRIAGE SETTLEMENTS 1601-1740 (1983).

78. P. 109. Beginning as early as the thirteenth century, a set of parallel rules developed in courts of equity to relieve women of some of the disadvantages of coverture. *See* FRIEDMAN, *supra* note 61, at 208 ("[C]ourts of equity had for a long time softened the husband's dictatorial control, by allowing a father or other relative to establish a separate estate for the woman, through a premarital settlement or by way of a trust."). *See generally* MARYLYNN SALMON, WOMEN AND THE LAW OF PROPERTY IN EARLY AMERICA 116 (1986).

79. *See* Chused, *supra* note 40, at 1398-1400.

80. FRIEDMAN, *supra* note 61, at 495-96; *see also* Siegel, *Marital Status Law*, *supra*

But even as the practical effect of unity was slowly undermined—first through the protection of courts of equity and later by statute—the concept of marital unity retained great rhetorical power.

> As a symbol of the proper place of a wife within her husband's household and of her dependency in relation to his rulership, marital unity had a crucial place in the political culture of early nineteenth century America. It was a fiction that supported the principle of wifely dependency and thereby helped establish the terms of republican male citizenship. As a legal concept, however, marital unity was both protean and weak: unchallenged and ever present, yet of uncertain significance.[81]

Why did the pretense of absolute marital unity remain so strong? One factor, Hartog suggests, may be the efforts of women's rights advocates to paint a bleak picture to galvanize support for their emerging movement.[82] But effective demonization is only possible where some social reality underlies it. In many real respects, married women were incomplete and lacked the basic rights necessary for self-preservation, much less self-fulfillment.

It may be, as Hartog says, that the notion of unity was flexible, and the disabilities of coverture were less rigid in practice than in theory. He may be right that husbands did not exercise—or did not believe they could exercise—the right of moderate correction.[83] But the law on the books nonetheless mattered. It is that strict law that formed the basis for early rejections of women's claims to equality. In *Bradwell v. Illinois*, the Supreme Court refused to overturn a state law prohibiting women from practicing law.[84] As a constitutional matter, the Court held that the practice of law was not a traditionally protected right of women. It did not therefore offend the

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note 12; Amy Dru Stanley, *Conjugal Bonds and Wage Labor: Rights of Contract in the Age of Emancipation*, 75 J. AM. HIST. 471 (1988). Joan Hoff has compiled a useful appendix cataloguing the adoption of married women's property acts across the country and the specific rights they granted. *See* HOFF, *supra* note 61, at 377-82.

81. P. 110.

82. Pp. 122-23. The first women's rights movement is dated to 1848, when hundreds of reformers assembled in Seneca Falls, New York, for a convention to address women's inequality. *See Declaration of Sentiments, Seneca Falls Convention, Seneca Falls, New York (July 1848), in* 1 HISTORY OF WOMAN SUFFRAGE, 1848-1861, at 70–71 (Elizabeth Cady Stanton, Susan B. Anthony & Matilda Joslyn Gage eds., 1881).

83. P. 105.

84. 83 U.S. (16 Wall.) 130, 139 (1872). The Wisconsin Supreme Court reached a similar result in *In re Goodell*, reasoning that the practice of law would be inconsistent with the "law of nature [which] destines and qualifies the female sex for the bearing and nurture of the children of our race and for the custody of the homes of the world and their maintenance in love and honor." 39 Wis. 232, 245 (1875). The statutes being challenged in these cases were typical of the era; most states made it difficult, if not impossible, for women to practice law until well into the twentieth century. Barbara A. Babcock, *Feminist Lawyers*, 50 STAN. L. REV. 1689, 1695 (1998) (describing women's legal challenges to exclusion from the practice of law throughout the last decades of the nineteenth century and the first decades of the twentieth); *see also* VIRGINIA DRACHMAN, SISTERS IN LAW: WOMEN LAWYERS IN MODERN AMERICAN HISTORY (1998) (giving a general history of women at the bar).

Privileges and Immunities clause of the Fourteenth Amendment when Illinois refused to allow women to engage in it. [85] To reach that result, the majority relied in part on the legal inability of married women to enter into contracts.[86] After all, the Court cautioned, what kind of lawyer would a woman be if she could not enforce contractual fee agreements?[87] Thus, the strict law of coverture, however emasculated in practice, was used to deny equality to women outside of the domestic relations context.[88]

That case, and others of its ilk, are also important for illustrating the power of the law of husband and wife. For within that body of law, "the fundamental contrast" was "not that between men and women but that between single women and married women .... A single woman's legal status was, for the most part, indistinguishable from the legal status of many men."[89] And within the context of domestic relations cases, married women fought to be treated like single women, which meant, usually, to be treated like men.[90]

The justification for the Court's refusal in *Bradwell* to grant women—*all women*—eligibility for admission to the state bar, however, did not apply to single women, as the contractual incapacity afflicted only married women. But the Court in that case and other courts in the pre-modern era allowed states to legislate for the general rule, not the exception. As the Wisconsin Supreme Court explained in *In re Goodell*:

> The cruel chances of life sometimes baffle both sexes, and may leave women free from the peculiar duties of their sex. These may need employment, and should be welcome to any not derogatory to their sex and its proprieties, or inconsistent with the good order of society. *But it is public policy to provide for the sex, not for its superfluous members....*[91]

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85. *Bradwell*, 83 U.S. (16 Wall.) at 139.

86. *Id.* at 141 (Bradley, J., concurring) ("This very incapacity [to make contracts] was one circumstance which the Supreme Court of Illinois deemed important in rendering a married woman incompetent fully to perform the duties and trusts that belong to the office of an attorney and counsellor."); *see also* Babcock, *supra* note 84, at 1691-92 (noting that many courts refused women admission to the bar based in part on the legal disabilities imposed on married women).

87. 83 U.S. (16 Wall.) at 141 (Bradley, J., concurring). Even as applied to married women, Justice Bradley's concern was not entirely warranted. Some states explicitly permitted a married woman to operate as a "feme sole trader" with consent of her husband. That status permitted a woman to own a business in her own name, execute binding contracts, and sue and be sued as if she were single. *See* SALMON, *supra* note 78, at 44.

88. Nancy Cott highlights another debilitating consequence of the formal principle of unity. In 1907, Congress enacted an immigration law, which provided that an American woman who married a foreign-born man would automatically lose her American citizenship. COTT, *supra* note 9, at 143. Such a wife could only repatriate if her husband was naturalized. *Id.* at 143–44. Cott also notes that the Freedmen's Bureau, charged with transforming ex-slaves into paid workers, institutionalized the formal principles of coverture, issuing labor contracts that awarded a wife's wages to her husband. *Id.* at 93.

89. P. 118.

90. *See* text accompanying notes 76-80 *supra*.

91. 39 Wis. at 245 (emphasis added); *see also Bradwell*, 83 U.S. (16 Wall.) at 141-42

Thus, Hartog's claim that "[s]ingle-married, that was the fundamental legal divide,"[92] may be overstated. That distinction was of fundamental importance in some respects, as evidenced by the insistence of separated women that they be treated like single women, but unimportant in others. For while the law treated married women as legally inferior to single ones, it also sometimes, in adjudging women's claims to equality, treated all women as married.[93]

2. *Coercion.*

Coercion—the existence of and protection from it—played an important role in the law of nineteenth-century marriage. Hartog makes a convincing argument that courts flexibly adapted the concept of unity to avoid coercion: In some instances they strictly enforced it to protect women from undue coercion, but in others they relaxed it to accomplish the same goal. The offense of criminal conversation, committed by a man who slept with another man's wife, is one example. The male lover was considered the offender because he was presumed to have coerced the other man's wife into the relationship; the wife's legal identity, and thus her capacity to consent, was not recognized.[94] Here, the principle of unity was strictly enforced. On the other hand, men who sought to sell property otherwise subject to dower interests were seldom taken at their word that their wives had consented to the sale.[95] The court instead would subject the wife to a "separate examination" to see whether she voluntarily waived her interest in the property. Her legal identity there was recognized because it was necessary to illuminate the husband's presumed coercion.[96]

(Bradley, J., concurring) ("[Although] many women are unmarried and not affected by any of the duties, complications, and incapacities arising out of the married state," the "rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases."). Modern equal protection jurisprudence prohibits sexually discriminatory laws that are based on generalizations—even if largely true—about women. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 550-51 (1996) (suggesting the Virginia Military Institute's male-only admissions policy would violate the equal protection clause even if only a single woman could succeed in the program). Laws that regulated all women based on a disability peculiar to wives would thus not survive.

92. P. 93.

93. Nancy Cott also notes the tendency to treat all women as wives in the context of citizenship. "Congressmen tended to slip easily between standards about 'women' and 'wives' with regard to citizenship. The wife's enforced civic dependency influenced their views of all women, who were potential wives." COTT, *supra* note 9, at 96.

94. P. 137.

95. Dower gave a wife a one-third life interest in the real property of her husband at his death. The right of dower attached to his property at the time of marriage or any subsequent acquisition of property, and thus property could not be sold without the wife's voluntary waiver. P. 145.

96. P. 146; *see also In re* Williams' Estate, 102 Cal. 70, 80–81 (1894) ("[T]he object of the [adoption] statute in directing the judge to make a separate examination of the parties, was for the protection of a wife, or child over the age of twelve years, whose consent is made essential to the creation of the contract, by guarding them in some degree from the possible

The law's treatment of separate estates, described above,[97] is another example of a systemic tendency to protect wives from husbandly coercion. Initially, separate estates created by trust were presumed to lodge all managerial power in the trustees whether or not the instrument included such a restriction,[98] leaving women powerless to dispose of the property. But later, courts adopted the opposite presumption: wives could control their separate estates unless the trust instrument expressly precluded it.[99]

The more legal control women had over their premarital property, however, the more vulnerable they were to coercion by their husbands, who could force a perfectly legal conveyance from husband to wife. In 1817, Chancellor Kent tried to build a wall against that coercion by holding that wives could not convey property held in a separate estate to their husbands.[100] "Separate estates existed because of the structural reality of marital coercion,"[101] Hartog contends, and this interpretation shored up their protective capacity. Kent's interpretation did not prevail,[102] though the equitable recognition of separate use agreements did. The end result was an uncertain victory for wives: They could retain separate estates, but the law permitted them to make conveyances to their husbands. Legal rights were in some cases the vehicle for perpetrating oppression of wives by their husbands. [103]

Hartog's narrative of Harriet Douglas Cruger illustrates the practical effect of this new interpretation. Harriet, a rich woman with ideas far ahead of her time,[104] retained control over her significant wealth through a marriage settlement agreement. Her marriage deteriorated and eventually, to stave off litigation, she executed a document giving her husband half the income from her trust assets. She later claimed that she was coerced by her husband and a cadre of his advisors into executing it. But her claim of coercion was unsuccessful. The court recognized the marriage settlement (which allowed her to keep her wealth in her own name), but refused to invalidate the assignment (which upheld her conveyance of one-half to her husband) despite her

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coercive influence of the husband or parent, and also to enable the judge to ascertain whether the consent of such persons was entirely free.").

97. *See* text accompanying notes 76–79 *supra*.

98. *See* SALMON, *supra* note 78, at 116.

99. *See id.*

100. P. 170 (citing Jacques v. Methodist Episcopal Church, 17 Johns. 548 (N.Y. 1817)).

101. *Id.*

102. Pp. 173-74.

103. This is perhaps an example of what Reva Siegel terms "preservation through transformation," when an apparent move toward equality perpetuates the inequality through other means. *See* Siegel, *Rule of Love*, *supra* note 12, at 2119.

104. For example, she stated that any man she might marry would have to take her name, give up his profession, live where she wished to live, and permit her to retain full control of all her inherited wealth. "Implicitly, she required that her husband become her wife." Pp. 175-76.

allegation of coercion.[105] What the court gave with one hand, it took away with the other.

Separate estates were eventually recognized by the married women's property acts as a legal (as opposed to equitable) device, available even without a separate use or trust agreement.[106] But as wives gained legal rights over property, concerns about coercion reappeared.[107]

Courts' flexible reliance on the concept of unity was not the only protection for women against marital coercion. In some respects, Hartog argues, the principles of coverture actually protected women by preventing men from exercising undue coercion over them.[108] Because husbands' rights were so clearly established by the doctrine, he contends, they did not need to resort to violence to exact obedience. [109] This argument is not terribly convincing.

But perhaps the availability of divorce on grounds of cruelty, more so as the nineteenth century progressed, provided some concrete limits on the husband's "right" to control his wife. The grounds for divorce—on the books and in practice—delineated between acceptable control, which the law might have permitted, and cruelty or abuse, which it forbade. By 1886, nearly four-fifths of the states permitted absolute divorce on the basis of cruelty.[110] And many courts by that time had granted divorces on that ground based on emotional or mental, rather than physical, cruelty.[111]

In the Alameda County study of divorce records at the end of the nineteenth century, cruelty played some role in limiting the husband's power to

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105. Pp. 176-86.

106. P. 176. *See also* Chused, *supra* note 40; Siegel, *Home as Work, supra* note 12; Siegel, *Marital Status Law, supra* note 12.

107. P. 187.

108. P. 168.

109. Hartog's interpretation of coverture's impact on women stands in stark contrast to Reva Siegel's. For Siegel, not only did coverture have a predictably oppressive impact on women, but so did the principles that replaced it. *See* Siegel, *Marital Status Law, supra* note 12; Siegel, *Home as Work, supra* note 12. Nancy Cott agrees that the Married Women's Property Acts, which lifted many of the disabilities of coverture, were "implemented conservatively." COTT, *supra* note 9, at 53.

110. CARROLL D. WRIGHT, DEPARTMENT OF LABOR, A REPORT ON MARRIAGE AND DIVORCE IN THE UNITED STATES, 1867-1886, at 89-113 (1908). Some states required that the cruelty be severe enough to endanger the victim-spouse's life, but most gave only a general standard like "extreme cruelty" or "cruel or barbarous treatment." *Id.*

111. *See* BASCH, *supra* note 21, at 61 ("Physical cruelty was a ground [for divorce] that renegotiated the terms on which women contracted marriage . . . ."); MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 63 (1987) (" '[C]ruelty' came to encompass mental cruelty in the divorce courts."); GRISWOLD, *supra* note 18, at 18-20 (summarizing California appellate opinions interpreting cruelty to include aspersions of character and other types of mental abuse); Jane Turner Censer, *"Smiling Through Her Tears": Ante-Bellum Southern Women and Divorce*, 25 AM. J. LEGAL HIST. 24, 28-29 (1981) (noting that several southern states had granted divorces based on personal indignities by the end of the ante-bellum period).

control the household.[112] Thirty-five percent of divorce plaintiffs cited cruelty as the primary ground for divorce,[113] and most of those were women.[114] But what is important to the question of male power within a marriage is not only the number of petitions, but also the conduct cited in those complaints.

These records suggest, at the very least, that the ground of cruelty was used to remedy gross physical and mental abuse. Through their allegations of cruelty, wives objected to physical and mental abuse, sexual excessiveness and brutality, starvation and neglect, and abandonment. In contrast, husbands who claimed "cruelty" complained of wives who slept with other men, prostituted themselves, or neglected to cook, clean, or care for children.[115]

Physical abuse was the largest subcategory of cruelty cases. Twenty percent of female cruelty plaintiffs alleged real, physical injury.[116] Courts were receptive to these claims, denying not a single one in the Alameda County study. Most of the plaintiffs alleged unprovoked, violence at the hands of their spouses; often the incidents complained of were severe enough to warrant criminal action. H.G. Williams, for example, was arrested for beating his wife when she left to take a bike ride without his permission: "he beat her cruelly, pulled her by the hair, nearly closed her left eye, caught her by the throat and

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112. Some statutes explicitly framed cruelty as a remedy for women. Censer, *supra* note 111, at 27; *see also* BASCH, *supra* note 21, at 61 (discussing the ground of cruelty as a factor in the nineteenth-century gender realignment); GROSSBERG, *supra* note 25, at 232-34 (discussing the role of mental cruelty as a grounds for divorce in the power struggle between men and women).

113. Grossman & Guthrie, *Alameda County Study*, *supra* note 13. Although cruelty was a popular ground on which to sue, plaintiffs experienced a considerably lower success rate (78%) than with other grounds (86%). But the disparity is explained primarily by voluntary dismissals by the parties, rather than denials by the court (18% versus 11% overall). *Id.* This may suggest that cruelty was used as a tool to coerce reform rather than to secure a divorce.

114. Eighty-six percent of the cruelty plaintiffs were women. *Id.* The Alameda County data suggest that cruelty was more common among couples in lower socioeconomic classes. A higher percentage of families involved in these cases practiced unskilled trades and worked as common laborers and a correspondingly lower percentage worked at skilled trades or fell into the category "middle class." *Id.*

115. Conrad Van Meter complained that his wife "commonly allowed the dwelling house . . . to be and remain in a dirty condition . . . the kitchen was at all times especially dirty, refuse matter being allowed to stand therein until the air of the room was foul, offensive to the smell, and unhealthy to breathe." She also "seldom served the family meals at the proper time . . . [and they] were commonly so badly cooked and poorly served as to endanger plaintiff's health." Grossman & Guthrie, *Alameda County Study*, *supra* note 13, Docket No. 19408.

116. There is reason to be cautious in analyzing the allegations in divorce petitions because of the problem of collusion. *See* text accompanying notes 36-39 *supra*; *see also* Friedman & Percival, *supra* note 36, at 79 ("As demand for divorce rose, the grounds *alleged* for divorce changed; they corresponded less and less with the real or underlying causes.") But even if these cases do not tell us what in fact occurred between husbands and wives, they reveal the norms being applied to evaluate marital misconduct. This, in turn, tells us something about societal expectations for marriage. *See* text accompanying note 33 *supra*.

threw her down and kneeled on her chest while he beat her." She sought and obtained a divorce.[117]

Another eighteen percent of female cruelty plaintiffs alleged emotional cruelty. Louisa Higgins, for example, was married to a "very bad man, unworthy of the woman who called him husband."[118] Louisa testified that Edward would

> wreck my feelings with his cold words. While he would not use profane language he would hurt me with his coldness. I remember when I was ill in New York. It was very cold and I had a very high fever. The doctor wanted me removed to a room where there was a fire and my husband replied: 'If she has to die she might just as well die here as anywhere.'[119]

This cruelty was sufficient to earn Louisa a divorce. Other wives alleged a range of conduct, from throwing the contents of a chamber pot in one wife's face[120] to insulting a woman's friend by refusing to eat dinner with "such god damned company about her."[121]

A substantial number of women's complaints dealt with sexual cruelty. Mary Thornton brought a typical suit, complaining that her husband "engaged in a course of sexual brutality."[122] "He is a man of violent passion and he wanted sexual intercourse every night, and sometimes two or three times a night," she testified, "and he would become very violent and cross, when I wouldn't gratify his desires, and call me names."[123] His retort when she would not submit was, ironically, to call her a whore. Women also objected to the infliction of venereal disease[124] and forced prostitution.[125]

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117. *Wife Beaten by Husband: She Took a Bike Ride Without Permission and Was Brutally Beaten*, OAKLAND TRIB., Apr. 26, 1900, at 1. A precursor to the burning bed, some women took the law in their own hands rather than appealing to a divorce court. Mrs. Charles Adams was such a woman; she murdered her husband on account of the extreme brutality shown to her and her children. *Brutal Husband Killed*, OAKLAND TRIB., Mar. 16, 1900, at 1.

118. *Coldness is Cruelty: A Husband Who Treated His Wife With Utter Unconcern*, OAKLAND DAILY EVENING TRIB., Feb. 13, 1890, at 1.

119. *Id.*

120. Grossman & Guthrie, *Alameda County Study*, *supra* note 13, Docket No. 11858.

121. *Id.*, Docket No. 20376.

122. *Id.*, Docket No. 17278.

123. *Id.* Mary also claimed that she was once sick in bed pursuant to doctor's orders when her husband came in the room, swore and cursed, and screamed that she was not ill, "but was only shamming, playing lazy." *Id.*

124. For example, Theresa Spier sued for divorce because her husband associated with "lewd and dissolute women," and became "infected with a disgusting, highly infectious, venereal disease and well knowing that he was so affected, and without giving plaintiff any notice or information of his condition, had marital intercourse with her whereby [she] became affected." Grossman & Guthrie, *Alameda County Study*, *supra* note 13, Docket No. 11002.

125. Edith Baldwin filed for divorce upon discovering that her husband had forced her to take a waitressing job for which she was required to "allow said male patrons to sleep with her . . . and to commit adultery with her . . . or else cease to be an employee of the

The sexual cruelty cases illustrate an important limitation on male behavior in marriage;[126] though men were entitled to sexual relations as part of the marriage contract, this right was limited both by a woman's health and some notion of excessiveness.[127]

Women also sought and obtained "cruelty" divorces based on maltreatment. Eighteen of the 231 cruelty plaintiffs sought divorce because they were locked in, forced out, overworked, or taken somewhere far from home and abandoned.[128] The remaining female cruelty plaintiffs complained of husbands who falsely accused them of engaging in adultery or prostitution,[129] who maliciously destroyed personal property,[130] or who threatened them with physical harm.[131] These cruelty claims, which were

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restaurant." *Id.*, Docket No. 18950.

126. *See* PLECK, *supra* note 56, at 89-94 (discussing role of sexual brutality in divorce). The right to resist sex, particularly given the physical danger to women posed by both childbirth and venereal disease, was part of the women's rights platform in the middle of the nineteenth century. *See* COTT, *supra* note 9, at 67; *see also* PLECK *supra* note 56, at 90-91 (noting the belief of some feminists that "[d]ivorce was the sole remedy" for a "loveless marriage and a union in which the husband forced his wife to submit to sex").

127. The standard for excessiveness was quite high. Most claims of this type alleged that the husband attempted or required sex upwards of three times a day. Many women brought in doctors as expert witnesses, despite the infrequency with which experts were used in divorce cases, to testify about the resulting physical and emotional harm. Anna Caruth, for example, called her family physician to the stand to explain the impact of her wedding night, on which her husband "approached [her] five times, had connection five times," all against her will. He also forced her to assume many different positions, while assuring her that "he never loved her and never would." Grossman & Guthrie, *Alameda County Study*, *supra* note 13, Docket No. 14190. His sexual demands were too great for the small woman, the doctor testified, and consequently, "made the parts very swollen and inflamed," and caused her "sickness and nervous prostration." *Id.*

128. A pregnant Margaret Sinkwitz complained that her husband took her on a camping trip and left her 15 miles from home, *Id.*, Docket No. 18923, while Mrs. Cummings sought a divorce from her husband on cruelty grounds because he "used to arise early in the morning and burn old rags in order to smoke her out of the house." *Smoked Her Out: Cummings' Plan to Get His Wife Out of Bed*, OAKLAND DAILY EVENING TRIB., July 5, 1890, at 1.

129. After William Allen's wife, Meda, went to the drugstore to buy little bath rags, he demanded to know "where in the hell" she got those "cock rags;" "those are what they use in whore houses," he yelled knowingly, and "nothing but fast women have those in their possession." Grossman & Guthrie, *Alameda County Study*, *supra* note 13, Docket No. 14363.

130. Louisa Engel reached her limit when her husband insisted on throwing soup, chicken, water and her sewing machine in the yard. He promised to reform, but Louisa "couldn't trust him anymore. He [had] promised too often and never kept his promises." *Id.*, Docket No. 13522. Her request for divorce was granted.

131. Thirteen percent of female cruelty plaintiffs based their complaint solely on *threats* of physical violence; only one of these thirty plaintiffs was denied her sought-after divorce. Harriet Leonard alleged that her husband warned her that "there was one nigger woman in West Oakland that got filled with hot lead, and if you don't get out of here quick, I'll fill you full of hot lead," leading Harriet's dentist to refuse "to work on her teeth because she was so nervous." *Id.*, Docket No. 23758.

almost always successful, played a role in limiting the extent of husbandly control.[132]

3. *Uniformity.*

Another important aspect of Hartog's depiction of nineteenth-century marriage is its uniformity. Hartog's research provides further support for the contention that marriage in the nineteenth century was primarily a status relationship—a social institution that was appropriately subject to state standardization and regulation.[133] That changed through the course of the twentieth century, through "the gradual substitution of individuals' choices concerning the nature, duration, the terms of their relationships, for standardized formulas imposed by the state."[134]

But in the nineteenth century marriage was theoretically and legally a uniform status—all husbands had the same rights and duties prescribed by law, all wives were entitled to the same reciprocal rights and duties.[135] Of course, not every couple adhered to these prescribed roles behind closed doors, but courts did not permit them to be formally altered.[136] Couples who attempted to alter the terms of their own marriages met with resounding disapproval.[137]

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132. My interpretation of the Alameda County cruelty cases as establishing a fairly lenient standard stands in some tension with Reva Siegel's analysis of Massachusetts divorce law. Based on appellate cases, she concludes that the cruelty standard was strict, "premised on the assumption that a wife was obliged to endure various kinds of violence as a normal—and sometimes deserved—part of married life." Siegel, *Rule of Love, supra* note 12, at 2134.

133. Lord Mansfield's contractual view of marriage, circa 1783, was a short-lived exception to this characterization. Pp. 77-83; *see also* COTT, *supra* note 9, at 11 ("The man and woman consented to marry, but public authorities set the terms of the marriage, so that it brought predictable rewards and duties.").

134. Martha L. Fineman, *Implementing Equality: Ideology, Contradiction and Social Change. A Study of Rhetoric and Results in the Regulation of the Consequences of Divorce*, 1983 WIS. L. REV. 789, 796; *see also* DiFonzo, *supra* note 59 (describing increasing customization of marriage); Hartog, *supra* note 6, at 95-96 ("There are [today] as many types of marriages as there are married couples, each one the product of the distinctive choices and investments of its partners."); MARY ANN GLENDON, THE NEW FAMILY AND THE NEW PROPERTY 107 (1981); Michael Grossberg, *Guarding the Altar: Physiological Restrictions and the Rise of State Intervention in Matrimony*, 26 AM. J. LEGAL HIST. 197 (1982). On the twentieth-century shift from state regulation toward private ordering in family relations, see generally Naomi Cahn, *Looking at Marriage*, 98 MICH. L. REV. 1766, 1770 (2000) (noting the "shift from state intervention and state-imposed norms toward more private decisionmaking"); Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1444 (noting the "preference for private over public ordering" in modern family law doctrines and procedures).

135. *See* text accompanying notes 67-71 *supra.*

136. *See* COTT, *supra* note 9, at 102 ("[C]ourts emphasized that the marital bargain, although entered by consent, could not be changed, modified, or ended thereby . . . .").

137. Though many couples may have tried to alter the standard terms of marriage privately, few renounced them openly enough to engender public disapproval. But Lucy Stone and Henry Blackwell were a notable exception. On their wedding day, Stone and

Hartog draws on the sometimes complicated history of separate maintenance agreements to illustrate this point. Many couples parting ways entered into separation or separate maintenance agreements.[138] These agreements were designed to mimic a formal separation, by dividing property and children between a husband and wife that intended to live apart, without invoking any legal process for ending the marriage.[139] Typical provisions of an agreement might be that a husband would no longer be responsible for his wife's support, that the wife would have the right to keep her own earnings, or that the wife would have custody of the children. The upshot of such provisions, if enforceable, would be to sanction either a marriage that did not conform to the law's expectations—for the informally separated were still legally married—or a separation without grounds. Neither was acceptable.

Against a backdrop of early law of husband and wife, Hartog identifies two obstacles to the enforcement of separate maintenance agreements. First was the notion that marriage, though individually carried out by private parties, was a public institution, granted and regulated by the state.[140] The rights and obligations imposed by that institution were immutable, not subject to individual adaptation.[141] Second was the fact that under the principles of coverture a married man and woman were part of a single, legal entity. Allowing husband and wife to enter into a contract would have the technical effect of sanctioning a contract made between a man and himself.[142]

The problem of unity could be cured through the use of a trustee—thus avoiding, at least in form, a contract between husband and wife.[143] Post-nuptial trusts, which had the effect of giving a separated wife control over her share of the divided property, were routinely enforced by courts of equity.[144]

Blackwell executed a "marriage protest," rejecting the Blackstonian marriage in favor of a more egalitarian partnership. *See* Herma Hill Kay, *From the Second Sex to the Joint Venture: An Overview of Women's Rights and Family Law in the United States During the Twentieth Century*, 88 CAL. L. REV. 2017, 2021–22 (2000); COTT, *supra* note 9, at 64. Stone also rejected the convention that a wife assume her husband's surname. *See* Omi, *The Problem That Has No Name*, 4 CARDOZO WOMEN'S L.J. 321, 387 (1998). Although her renunciation of that tradition was the inspiration for generations of feminists fighting for the right of married women to keep their own names, it was largely disapproved of by her contemporaries. Organizers of an 1856 Woman's Rights Convention insisted that she appear under the name "Lucy Stone Blackwell." *Id* at 398 n.444.

138. These are different from separate estates, which protect a wife's premarital wealth during the marriage. *See* text accompanying notes 76–80 *supra*.

139. Pp. 76–77.

140. P. 77.

141. P. 57.

142. *Id.*

143. *See* STONE, *supra* note 42, at 150 (discussing the prevalence of private separation deeds between a husband and a trustee for his wife, because the wife had no separate legal identity). The trust was the device used to create separate estates during marriage as well. *See* text accompanying notes 76-77 *supra*.

144. SALMON, *supra* note 78, at 58-59.

But common law courts generally refused to enforce what was, in substance, a contract between husband and wife, even if the presence of a trustee removed the technical obstacle.[145]

The enforceability of such agreements outside of courts of equity was the subject of high-level debate between two important English jurists, Lords Mansfield and Kenyon.[146] Ironically, the high water mark of the enforceability of separation agreements came in the late 1700s, when Lord Mansfield took a contractual view of marriage and recognized that husbands and wives could change the terms of their relationship under certain circumstances.[147] But his successor, Lord Kenyon, rejected that view in *Marshall v. Rutton* and declared such contracts to be illegal.[148] It was that view that carried the day—and the next century. Marriages were controlled by law, not spouses.

Common law marriage may pose a challenge to Hartog's claim that marriage was a rigidly uniform structure in the nineteenth century. Common law marriages were valid in most states,[149] allowing couples to contractually create a marriage, without bowing to the government's dictated formality.[150] Once formed, a common law marriage could be used as a basis for claims of inheritance and support. But for the most part, marriage was a uniform relationship, whose terms were dictated by the state rather than the participants.

II. STATUS TWO: MARRIED (BUT LIVING APART)

Separation was a fact of life in nineteenth-century America. Separations came about for myriad reasons, some unrelated to marital happiness. Some started "with the search for work, for land, for gold, for economic security, for freedom, for escape from a stultifying social environment, religious conflict, warfare."[151] Other separations were the product of marital discord, leading one

145. *Id.* at 59. Not surprisingly, the strictness of a state's divorce law was inversely related to its willingness to enforce separate maintenance agreements. A liberal divorce law gave women who were in fact living apart from their husbands a way to obtain the legal status necessary to function independently—by getting a divorce. There was, therefore, no pressure on the law to recognize separate maintenance agreements or sole trader rights for women who, although formally married, were nonetheless trying to function independently. But where divorce was harder to obtain, separation agreements "served a vital social function." *Id.* at 71.

146. Pp. 77-86. Though the technical problems of marital unity and the immutability of marital obligations may have occupied the discussion, the chimera of giving couples a right to separation, where the codified law did not, was clearly lurking. *See* text accompanying notes 153-159 *infra*.

147. P. 78.

148. *Id.* (citing Marshall v. Rutton, 8 T.R. 545 (K.B. 1800)); *see also* STONE, *supra* note 42, at 154-56 (describing the conservative reaction to Lord Mansfield's approach).

149. *See* note 8 *supra*.

150. *See* Dubler, *supra* note 8, at 1896 (noting the "diversity of relations" nineteenth-century judges had to confront).

151. P. 30. As Norma Basch posits, "men found anonymity in the expanding national

spouse to leave town in order to avoid the stigma of an unlawful separation, to find a state more amenable to divorce, or to enter a bigamous remarriage without being caught.[152]

Yet separation as a legal status has received scant attention in the substantial literature on marriage and marital stability. Hartog lays the groundwork for a refocused debate about marital instability and marital exits, posing some important questions for future research. Determining why couples separated rather than divorced and why couples separated informally is a good place to begin that project.

A. *The Legal Right to Separate*

Throughout the nineteenth century, states provided some mechanism for couples to obtain a court-approved separation. Such a separation—sometimes also called a divorce from bed and board, a divorce *a mensa et thoro*, or a limited divorce—was similar in many respects to divorce.[153] Couples had a right of separation in only certain, narrowly defined circumstances. Typical grounds for separation included cruelty or endangerment, neglect, desertion, and intemperance.[154] Spouses who found themselves in immediate physical danger generally had adequate grounds for a legal separation.[155] Separation statutes typically gave courts the authority to divide property,[156] order payment of alimony,[157] and award custody.[158] The only meaningful difference between separation and divorce was that the former deprived the couple of the right of remarriage.[159]

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landscape.... Simply stated, there were more places to go and more ways to get there." Basch, *supra* note 76, at 16.

152. Pp. 31-32. See also Lawrence M. Friedman, *Crimes of Mobility*, 43 STAN. L. REV. 637, 642 (1991) (describing two types of nineteenth-century bigamists, one of whom was "a man who found his first marriage unsatisfying or stifling; he decamped, without the bother of a divorce, and started over again, usually in some other city").

153. P. 36. *See also* FRIEDMAN, *supra* note 61, at 204.

154. *See, e.g.*, ME. REV. STAT. tit. V, § 12 (1871) (cruelty and neglect); MASS. GEN. STAT. ch. 107, § 9 (1860) (cruelty, desertion, intoxication, and neglect); MICH. GEN. STAT. ch. 237 § 6229 (1883) (cruelty, desertion, and neglect); N.Y. DOM. REL. LAW § 51 (Gould 1852) (cruelty, unsafe conduct, and neglect).

155. English law, which permitted no judicial divorce until 1857, provided for a separation in the case of conduct endangering life or limb. *See* GEORGE ELLIOTT HOWARD, 3 HISTORY OF MATRIMONIAL INSTITUTIONS 52-54, 93-97 (1904).

156. *See, e.g.*, ME. REV. STAT. tit. V, § 13 (1871); MICH. GEN. STAT. ch. 237 § 6241 (1883).

157. *See, e.g.*, N.Y. DOM. REL. LAW § 57 (Gould 1852).

158. *See, e.g.*, MICH. GEN. STAT. ch. 237 § 6238 (1883); N.Y. DOM. REL. LAW § 57 (Gould 1852).

159. *Cf.* ME. REV. STAT. tit. V, § 2 (1871) (either party to a divorce may marry again). The right of remarriage was not absolute following divorce, however. See, e.g., CAL. CIV. CODE § 61 (Deering 1899) (imposing a one-year waiting period between divorce and remarriage); N.Y. DOM. REL. LAW § 53 (Gould 1852) (depriving adultery defendant of right

Most states made it easier to obtain a separation than a divorce.[160] In Massachusetts, for example, an absolute divorce could be granted on grounds of adultery, impotency, desertion, or felony conviction,[161] while a limited divorce could be granted on the broader grounds of extreme cruelty, intemperance, or willful neglect.[162]

Despite the law's disdain for de facto separation, reflected not only in the statutory law that limited its availability, but also in the rhetoric of courts and treatise writers who vigorously denounced it,[163] formal, legalized separations occupied only a small proportion of the total. How small we do not know because informal separations, which had no official legal status, were not tracked in any meaningful way.[164] And legal historians have perhaps underemphasized it for that same reason.[165]

The prevalence of informal, and therefore unlawful, separations showed a real limitation of the power of law. There was, in fact, almost nothing courts

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to remarry during life of the plaintiff).

160. Even today, with no-fault divorce, states still provide for legal separation. *See, e.g.*, D.C. CODE § 16-904(a) (1966) (permitting a decree of separation from bed and board based on adultery, cruelty, or living apart). Those statutes serve couples who want to retain the option of reuniting, or, for other reasons, are unable or unwilling to get an absolute divorce. New York, for example, requires a formal separation as a precondition to divorce unless fault grounds are alleged. *See* N.Y. DOM. REL. LAW § 170 (McKinney 2001) (requiring that couples be separated for one year pursuant to either a legal decree of separation or a written separation agreement before filing for divorce).

161. *See* MASS. GEN. STAT. ch. 107, §§ 6, 7 (1860). A divorce could also be awarded to a party whose spouse joined a religious sect that did not believe in marriage, namely the Shakers. *See id.*

162. *See* MASS. GEN. STAT. ch. 107, § 9 (1860). The claim of willful neglect was, in most states, explicitly reserved to wives. *See, e.g.*, MICH. REV. STAT. tit. 7, ch. 2, § 4 (1838) (providing for limited divorce "on the application of the wife, when the husband, being of sufficient ability to provide a suitable maintenance for her, shall grossly or wantonly and cruelly refuse or neglect so to do"). In Maryland, women alleging cruelty, desertion, or neglect were most successful in obtaining decrees of separation. *See* SALMON, *supra* note 78, at 63.

163. P. 29 ("Judges and treatise writers inherited from eighteenth-century English law a stock set of pejorative phrases about separation."); P. 271 ("Separation existed as the dark underbelly of the received law of marriage.").

164. P. 32. Although there are far more statistics available for marriage and divorce than separation, even those numbers are inadequate. It was not until the twentieth century that most states began to keep accurate records of marriages and divorces. *See* Friedman & Percival, *supra* note 36, at 68 (cataloguing available statistics).

165. There are some exceptions to this generalization. Lawrence Stone focuses on separation in England during the seventeenth, eighteenth, and nineteenth centuries. *See* STONE, *supra* note 42, at 149-228. Carl Degler mentions separations in his attempt to assess marital stability in the eighteenth and nineteenth centuries. *See* CARL N. DEGLER, AT ODDS: WOMEN AND THE FAMILY IN AMERICA FROM THE REVOLUTION TO THE PRESENT 165-66 (1980). Marylynn Salmon talks about separation in her treatment of women's property rights. *See* SALMON, *supra* note 78, at 58, 71. Of course, non-legal American history, particularly frontier history, deals quite extensively with the incidents of mobility, like separation.

could do to prevent a truly mutual separation. Unilateral separation could be punished or cured by a criminal conviction for abandonment,[166] or a divorce granted to the innocent party on the same grounds.[167] But a truly consensual separation was beyond the law's reach. Courts could not generally compel a couple to live together (particularly if neither party brought it to their attention), nor could they force couples to get a divorce.[168] As Hartog concludes: "By the 1840s, perhaps earlier, separating had become an exercise of unchallengeable private freedom."[169]

B. *Separation Versus Divorce*

That nineteenth-century couples did separate is convincingly established by Hartog and others, but why they chose separation over divorce is more complicated. One of Hartog's truly important insights is that, for many nineteenth-century couples, separation was neither a stepping stone to divorce, nor simply a fallback option when divorce was not available.[170] Separation in the nineteenth century, he contends, constituted an entirely unique status, sought by many couples as an end in itself. The ideal of permanence was important to couples, and separation permitted marriage to remain an unalterable, lifetime status.

1. *Abigail and Asa Bailey.*

Separation allowed a couple to stay married without continuing to live in conflict, and a wife to achieve self-preservation, though not self-fulfillment. Abigail Bailey, a New Hampshire wife, presents the paradigmatic case. Hartog devotes a chapter to her marriage, separation, and eventual divorce.[171] Her husband, Asa Bailey, was a "violent and hard man who, after twenty years of

166. Friedman & Tabor, *supra* note 64, at 148-49 (describing cases from criminal docket that involved "crimes against family relations"); Grossman, *Dane County Study*, *supra* note 65.

167. *See, e.g.*, Paula Petrik, *Send the Bird and Cage: The Development of Divorce Law in Wyoming, 1868-1900*, 6 W. LEGAL HIST. 153, 155 (1993) (finding that two-thirds of all divorces recorded in one Wyoming county between 1869 and 1900 were premised on desertion, typically by men); *see also* Grossman & Guthrie, *Alameda County Study*, *supra* note 13 (finding that desertion was the most common ground for divorce in Alameda County between 1890 and 1910, comprising 40% of all divorce petitions). *See* notes 205–206 *infra* and accompanying text.

168. P. 30.

169. *Id.*

170. Although Hartog occasionally speaks of separation as a divorce substitute, see, for example, p. 29 ("When unhappy nineteenth-century couples lacked the legal grounds or the financial means or the moral or religious support to seek a divorce, many separated."), his central premise is to the contrary.

171. For a discussion of the value of relying on exceptional cases, *see* text accompanying notes 21, 25 *supra*.

marriage and the birth of fourteen children, sexually abused one of their daughters."[172] Abigail's struggle to renegotiate her self and her marriage, without running afoul of her Christian beliefs and her conventional views about marriage and its permanence, reveals volumes about the function of separation in that era.

For years after Abigail discovered her husband's misconduct, she did not avail herself of legal rights to a divorce, a formal separation, or even a criminal prosecution.[173] But eventually she changed course, deciding to take steps to stop his "'abominable wickedness and cruelties.'"[174] He ardently resisted a formal separation, reminding her that the law said she must submit to his control and authority. But she understood his right to power as dependent upon his marital duties, which he had breached.[175] He eventually elected to leave town "forever" rather than be haled into court.[176] But his exit was temporary, lasting only five weeks.

The rest of their relationship was marked by Asa's alternating pleas for forgiveness and attempts to stifle Abigail's efforts to obtain a formal separation and property division. He used his sole right of custody to threaten her with the loss of her children,[177] his right of domination to order her submission, and her reliance on his financial support to threaten her with starvation.[178] Ultimately,

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172. P. 40. Abigail's story is collected primarily from her posthumously published memoirs. *See id.*

173. P. 41. Women in most states had some legal protection against spousal abuse. *See* RODERICK PHILLIPS, PUTTING ASUNDER: A HISTORY OF DIVORCE IN WESTERN SOCIETY 330-331 (1988); *see generally* PLECK, *supra* note 56, at 88-107.

174. P. 47.

175. *Id.*

176. P. 48.

177. Pp. 51-52, 60. Until the end of the nineteenth century, women had no custody or guardianship rights to children. *See* Lawrence M. Friedman, Joanna L. Grossman & Chris Guthrie, *Guardians: A Research Note*, 40 AM. J. LEG. HIST. 146, 152-53 (1996); *see also* BLACKSTONE'S COMMENTARIES ON THE LAW 196 (Bernard C. Gavit ed., 1892) ("A mother is only entitled to reverance and respect."); GROSSBERG, *supra* note 8, at 234-37; MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES 60-61 (1994). Men could lose custody rights, but only following a finding of unfitness. When both parents were "fit," there was no comparative evaluation of the relative merits of the mother over the father where they had separated. P. 201. *But see* Censer, *supra* note 111, at 43-45 (suggesting that southern appellate judges in the ante-bellum period were inclined to award custody to women if they could prove superiority over their husbands). Even where women had been widowed, they had to seek court approval to become guardians of their children. *See* MASON, *supra*, at 65-66 (noting that a widowed mother, "now a widow *femme sole*, had no more rights to her children then when she was *femme couvert*"). Inequity with respect to guardianship rights was one of the practices identified in the Declaration of Sentiments, a list of the most significant aspects of women's oppression produced at the first women's rights convention in Seneca Falls, New York, in 1848. *See Declaration of Sentiments*, *supra* note 82.

178. Because of the common law duty of support, most merchants would permit wives to purchase necessaries on their husbands' credit. Asa threatened to post notices alerting local merchants that she should not be allowed to purchase anything on his credit, a common

Abigail sought and received a decree of divorce based on Asa's felony of incest.[179]

For Abigail, a separation was necessary to her self-preservation. From a religious standpoint, she worried about the effect of being linked with such an evil man on her hope for salvation.[180] From a community standpoint, she was troubled by the stigma that might mark her family because of Asa's conduct.[181] From a legal standpoint, her continuing to live with him would constitute condonation, and thereby deprive her of the right to a divorce.[182] Divorce became necessary when separation, because of Asa's failure to abide by their agreement and Abigail's fear of losing her children, failed to serve her desire for self-preservation.[183]

Although Abigail and Asa's separation turned out, in hindsight, to be a transition to their ultimate divorce, that was neither's original intention. "Abigail Bailey worked to separate herself from her husband, not to be divorced. That the story ends with her divorce is perhaps an accidental conclusion to the narrative."[184] They preferred separation because they perceived it to be less public, more accessible, and less an affront to their religious beliefs and social reputation. Separation would have enabled them to stay married, but live apart. Hartog suggests that the Baileys were not unusual in their preference for separation over divorce. Whether divorce was legally available, what extralegal constraints might have made it undesirable, and the economic and non-economic consequences of obtaining one are important to understanding why couples might have elected to separate rather than divorce.

2. *The legal availability of divorce.*

The early history of American divorce is by now a familiar story.[185] Prior to the Revolutionary War, divorce was rare and highly restricted. England, in

practice for husbands in the midst of a separation, divorce, or other marital conflict. P. 50. *Cf.* STONE, *supra* note 42, at 161 (noting that in England, for a "private separation document to be legally enforceable . . . the husband was also expected publicly to warn shop-keepers in the vicinity in future not to allow his separated wife credit for goods and then expect him to pay for them").

179. P. 52.

180. P. 48

181. *Id.*

182. *See* text accompanying note 29 *infra.*

183. P. 53-54.

184. P. 52.

185. There is a substantial literature on the history of divorce. *See* BASCH, *supra* note 21; NELSON MANFRED BLAKE, THE ROAD TO RENO: A HISTORY OF DIVORCE IN THE UNITED STATES (1977); RICHARD H. CHUSED, PRIVATE ACTS IN PUBLIC PLACES: A SOCIAL HISTORY OF DIVORCE IN THE FORMATIVE ERA OF AMERICAN FAMILY LAW (1994); DEGLER, *supra* note 165; DIFONZO, *supra* note 36; MARY ANN GLENDON, *supra* note 111; GRISWOLD, *supra* note 18; LYNNE CAROL HALEM, DIVORCE REFORM: CHANGING LEGAL AND SOCIAL PERSPECTIVES (1980); HERBERT JACOB, SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN

fact, had no judicial divorce until 1857.[186] South Carolina remained divorceless after Independence, though other southern states granted limited access to divorce.[187] Legislatures in northern states sometimes enacted private bills granting a divorce to a single couple, who, in the opinion of the legislators, deserved one.[188] The practice of legislative divorce gradually gave way in the mid-nineteenth century to general statutes providing for judicial—or courtroom—divorce.[189]

The obsolescence of legislative divorce was effected as a practical matter in most states by a mid-century constitutional revision banning special legislation in general or divorce bills in particular.[190] The motivation for taking divorce away from the legislature has been explained, by Lawrence Friedman, as a function of resources: The demand for divorce outstripped legislative capacity.[191] Richard Chused attributes the change to conservative law reform—legislative discretion to grant divorces on an ad hoc basis could be reined in by crafting statutes providing for judicial divorce only on narrow, specified grounds.[192] Hartog suggests that the transition to judicial divorce reflected newfound concerns about institutional competence.[193]

Early statutes providing for judicial divorce varied considerably from state to state. The first generation of statutes, enacted in the first quarter of the nineteenth century, included some that were quite liberal,[194] and some that were initially strict but quickly liberalized.[195] Iowa, for example, provided for divorce on numerous grounds, including when "either party shall offer such

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THE UNITED STATES (1988); MAY, *supra* note 40; WILLIAM L. O'NEILL, DIVORCE IN THE PROGRESSIVE ERA (1967); RODERICK PHILLIPS, *supra* note 173; MAX RHEINSTEIN, MARRIAGE STABILITY, DIVORCE, AND THE LAW (1972); GLENDA RILEY, DIVORCE: AN AMERICAN TRADITION (1991); STONE, *supra* note 42.

186. *See* FRIEDMAN, *supra* note 61, at 204. Prior to 1857, parliamentary divorce might have been an option for the very wealthy. *Id.*

187. *See* Censer, *supra* note 111, at 26-27 (challenging the frequent assertion that southern states other than the "intractable South Carolina" had more conservative divorce laws in the nineteenth century); Friedman & Percival, *supra* note 36, at 62.

188. *See* FRIEDMAN, *supra* note 61, at 204-05. Many states permitted courts to grant annulments and separations, while reserving the power of divorce to the legislature. *See* SALMON, *supra* note 78, at 64-65.

189. *See* FRIEDMAN, *supra* note 61, at 204-05; *see generally* CHUSED, *supra* note 185 (examining the rise, existence, and fall of legislative divorce in Maryland).

190. P. 71-72.

191. *See* Friedman, *supra* note 28, at 652 ("In large part, the rise of the judicial divorce was a function of increased demand. The legislative system was simply not geared to processing divorces in quantity.").

192. CHUSED, *supra* note 185, at 109-31.

193. Pp. 71-72.

194. Friedman, *supra* note 28, at 654 (citing an 1822 Rhode Island law that granted divorce for typical grounds or "any other gross misbehavior and wickedness . . . repugnant to or in violation of the marriage covenant").

195. *See* Censer, *supra* note 111, at 26 (noting widespread liberalization of divorce laws between 1830 and 1860).

indignities to the person of the other as shall render his or her situation intolerable."[196] Other states liberalized their laws by enlarging the grounds for divorce to include those that had previously only justified separation.[197] New York marked the conservative end, providing that adultery was the only ground for divorce.[198] Massachusetts forged a middle ground, permitting divorce on more malleable grounds such as desertion.[199]

But most of those early, liberal laws fell prey to antidivorce reform in the second half of the century. Rather than steadily loosening, divorce laws in the nineteenth century expanded and constricted as reformers on one side or the other carried the day.[200] The middle of the century saw the restriction of initially liberal laws. States with open-ended or so-called omnibus clauses repealed them and replaced them with a stricter standard.[201] As the century progressed, other states tinkered as well. Some made divorce easier in order to attract the divorce business, by expanding the available grounds, reducing the length of residency required, or loosening restrictions on remarriage.[202] Others amended their laws to bring about a reduction in the divorce rate.[203]

As the close of the nineteenth century approached, the grounds required for divorce varied significantly from state to state. New York continued to anchor the conservative end of the spectrum by authorizing divorce only for adultery.[204] California, on the other hand, had a fairly liberal statute, allowing divorce on grounds of adultery, neglect, abandonment, intemperance, cruelty,

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196. IOWA REV. STAT. ch. 65, § 2 (1843). Connecticut, for example, provided for divorce on the basis of "misconduct," which included any act "that permanently destroys the happiness of the petitioner and defeats the purpose of the marriage relation." Act of June 19, 1849, ch. 21, 1849 Conn. Acts 17, quoted in Friedman & Percival, *supra* note 36, at 63; *see also* DiFonzo, *supra* note 59, at 886-87 (cataloguing examples of open-ended divorce grounds that appeared mid-nineteenth century).

197. Censer, *supra* note 111, at 24.

198. N.Y. REV. STAT. ch. 8, tit. 1, § 42 (1852).

199. MASS. GEN. LAWS ch. 107, § 7 (1860).

200. BASCH, *supra* note 21, at 68-93 (describing both sides of the reform movement between 1850 and 1870); Friedman, *supra* note 28, at 657 (stating with respect to divorce, "there was always a countermovement, opposed to simplicity and reform").

201. *See* Friedman, *supra* note 28, at 654; COTT, *supra* note 9, at 110 (noting that most states with omnibus grounds for divorce repealed them in the 1870s).

202. These are the features of codified divorce law that states altered to appeal to migratory divorce business. *See generally* FRIEDMAN, *supra* note 61, at 503 (stating that to "attract the 'tourist trade,' a state needed easy laws and a short residence period"); Friedman, *supra* note 28, at 661-62 (discussing the so-called "divorce mills" of the nineteenth century).

203. *See* MAY, *supra* note 40, at 4 ("Between 1889 and 1906, as the divorce rate began to accelerate rapidly, state legislatures across the country, most of them in the East, enacted more than one hundred pieces of restrictive marriage and divorce legislation in an effort to stem the tide.").

204. P. 72. Until 1966, New York continued to permit divorce only on grounds of adultery. *See* N.Y. REV. STAT. ch. 8, tit. 1, § 42 (1852). In 1966, New York amended its laws to allow divorce based on cruelty or desertion, as well as a separation of two years. N.Y. DOM. REL. LAW § 170 (McKinney 1966).

or felony conviction.[205] Most other states fell somewhere in between—typically permitting divorce for adultery, abandonment, and neglect.[206] By the turn of the twentieth century, many states had early no-fault provisions, permitting a couple to file for divorce based solely on the fact that they had lived apart for a significant period.[207]

3. *The practical availability of divorce.*

Separation permitted Abigail Bailey to reconcile her marital misgivings with her Christianity. In her eyes, she needed to stay married to avoid being a sinner, but needed to separate from her husband's sins for the same reason.[208] And because she did not need the right to remarry, a separation was a sufficient remedy. For her, there were extralegal constraints on her ability or willingness to obtain a divorce. Religious constraints undoubtedly limited the willingness of other nineteenth-century spouses to seek a divorce. Religion played a significant role in the debate over divorce reform in the middle of the nineteenth century, and there is every reason to believe that reflected the concerns of some portion of the population.[209]

Another consequence of religious conviction was that some couples sought annulments rather than divorces.[210] A civil annulment—granted by a court, not a church—decrees that no valid marriage ever existed due to a defect present at the time of its inception. A canonical annulment accomplishes the same result, though in the eyes of the church, not the law. Typical grounds for annulment in the nineteenth century included bigamy, fraud, impotence, age, and insanity.[211] Although the legal grounds do not expressly overlap, some couples eligible for

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205. CAL. CIV. CODE § 92 (Hart 1889).

206. *See* Wright, *supra* note 110 (cataloguing grounds for divorce in every state).

207. *See, e.g.*, MASS. GEN. STAT. ch. 107, § 10 (1859) (permitting absolute divorce after ten-year separation); *see also* DiFonzo, *supra* note 59, at 946-47 (cataloguing state provisions for divorce based on separation).

208. Pp. 53-54.

209. *See* BASCH, *supra* note 21, at 80-90 (describing the role of Christian moralists within the debate).

210. Although Hartog suggests, based on appellate cases, that annulments were rarely granted, there is reason to think otherwise. P. 99 ("Reasons entirely sufficient to justify breaking an engagement—for example, the fact that a woman was carrying another man's child, or that a man was impotent, or insanity on the part of either—were almost never sufficient to obtain an annulment."). A study of annulment cases in California between 1890 and 1910 revealed that 53.5% of annulments were granted, most often for bigamy or being underage. Joanna Grossman & Chris Guthrie, *The Road Less Taken: Annulment at the Turn of the Century*, 40 AM. J. LEGAL HIST. 307, 322 (1996). This may be an example of appellate cases reflecting the prevailing ideology, but not the prevailing practice. But at the same time the number of annulments sought in Alameda County during that period (93) was minuscule compared to the number of divorces (6408). *Id.* at 312 fig.1.

211. Some defects make a marriage void, making it invalid whether or not a court ever formally declares it so. Others make the marriage voidable, which renders it invalid only when the victim of the defect petitions for (and obtains) an annulment.

divorce could also make out a case for annulment.[212] But a civil annulment, which erases the marriage and permits a second marriage to be treated like a first, enabled spouses constrained by religious beliefs to reconcile a desire to remarry with religious beliefs that prohibited multiple marriages.

Religion was not the only extralegal force influencing the decision whether to stay married, separate, or divorce. Early nineteenth-century women were under moral and ideological pressure to preserve their marriages—even if that meant living apart.

> In a culture that increasingly invested middle-class women with a powerful moral influence over their husbands, which valorized the role of women in the domestic sphere, and indeed, imbued women with an idealized autonomy in the conjugal union, to succeed in divorce was tantamount to a more fundamental sort of failure.[213]

A supposed heightened sense of morality was part of what qualified women for their separate domestic sphere.[214] That moral influence was supposed to be exerted to coerce good husbandly behavior. The early women's temperance movement borrowed that image, urging women "to appeal to the drunkard's sense of family responsibility" to make them stop drinking.[215] Separation—or the ability to threaten it—may have been important to coercing behavioral reform.

But by later in the century, the women's temperance movement was growing throughout the country.[216] Once aligned with a men's temperance movement, the women's movement split off as women began to see alcoholism as one of the "wrongs done to women by men."[217]

In the second half of the century, temperance advocates tended to value female self-preservation over a moral obligation to save marriages, and thus they urged wives to exit marriage rather than engage in futile efforts to preserve it.[218] State laws gave credence to the new intolerance for habitual drinking by adding intemperance as a grounds for divorce.[219]

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212. *See* Grossman & Guthrie, *supra* note 210, at 323-24.

213. Basch, *supra* note 76, at 15.

214. *Id.* at 52, 100. *See also* BASCH, *supra* note 21, at 74-75 (describing some feminists who favored protection within marriage as opposed to divorce, "in a familiar endorsement of a wife's moral responsibility for marriage"); PLECK, *supra* note 56, at 52 (noting that separate spheres ideology "promoted the view that women had the power to reform the morals of fathers, sons, and brothers").

215. PLECK, *supra* note 56, at 49.

216. *See* PLECK, *supra* note 56, at 100-01.

217. *Id.* at 50. *See also* Siegel, *Rule of Love*, *supra* note 12, at 2127 (crediting temperance reformers for drawing attention to the problem of wife-beating).

218. *See* PLECK, *supra* note 56, at 49-50, 55.

219. *Compare, e.g.*, MICH. REV. STAT. pt. 2, tit. 7, ch. 2, § 3 (1838) (making no provision for divorce based on intemperance) *with* MICH. GEN. STAT. ch. 237, § 6228 (1883) (providing for an absolute divorce when either "the husband or wife shall have become an habitual drunkard"). *See also* CAL. CIV. CODE §§ 92, 106 (Hart 1889). Although few of the divorce cases in the Alameda County study were brought on grounds of temperance, as

The emerging women's rights movement may have also have encouraged women later in the nineteenth century to seek divorces. Marriage, according to those early reformers, oppressed women.[220] Elizabeth Cady Stanton was the most outspoken pro-divorce feminist, proclaiming at one point that "It is vain to look for the elevation of woman so long as she is degraded in marriage."[221]

But did these feminist, pro-divorce sentiments affect ordinary women? Studies of divorce records give some support for the assertion that the rising divorce rate was in part a function of "women's drive for greater autonomy within marriage and the family."[222] Divorces were sought and obtained more and more by women: In 1867, 62 percent of divorce plaintiffs nationally were women; this number steadily increased to almost 75 percent by the mid-twentieth century.[223]

The grounds on which women sought divorce also support this theory of greater autonomy. Most claims by women revolved around allegations of inadequate or inappropriate familial behavior by husbands: cruelty, desertion, drunkenness, and failure to provide.[224] Women were "demanding their rights under the doctrine of separate spheres."[225] The cases reflect an "unwillingness to resign themselves to the husband's inordinate power within the family."[226]

A few women in the Alameda County study explicitly adverted to feminist principles in justifying their petitions. For example, Mrs. Van Slyke testified that she would "have much better enjoyed life could she have been [sic] borne a widow, thus freeing herself from any of the possible cares of married life, and still enjoy a freedom which unmarried ladies are denied."[227] Moses Greenberg sought a divorce because his wife "thought that the whole marriage system was

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many as twenty percent adverted to alcohol abuse in describing the alleged grounds. *See* Grossman & Guthrie, *Alameda County Study, supra* note 13.

220. P. 102 (describing the reformers' belief that marriage should be condemned as an usurpation of God's authority to cause self-transformation).

221. DEGLER, *supra* note 165, at 175; *see also id.* at 165 (quoting a feminist English professor, Vida Scudder, who warned her students considering marriage that "If your marriage is like most I know, it will begin as an indulgence but will proceed into a discipline"). Degler presents a compelling account of the ways in which women's quest for equality drove the divorce rate at the end of the nineteenth century. *Id.* at 144-77; *see also* BASCH, *supra* note 21, at 68 (observing that between 1850 and 1870, "feminism was now in play in the debate over divorce").

222. DEGLER, *supra* note 165, at 168.

223. *See id.*; Friedman & Percival, *supra* note 36, at 70; Grossman & Guthrie, *Alameda County Study, supra* note 13. Lawrence Friedman and Robert Percival interpret this statistic as a product of the collusive nature of divorce. Because women were likely to end up with the children, by agreement, and because men stood to lose less by being accused of adultery, cruelty, or the like, a couple colluding to obtain a divorce would naturally choose the wife to be the "innocent" plaintiff. *See* Friedman & Percival, *supra* note 36, at 79.

224. *See* Friedman & Percival, *supra* note 36, at 70-71.

225. DEGLER, *supra* note 165, at 169.

226. *Id.* at 170.

227. *See* Grossman & Guthrie, *Alameda County Study, supra* note 13, Docket No. 11240.

wrong. She thought people should just simply live together, and if there were children the state should provide for them. Nobody ought to be forced to live with another system."[228]

But these feminist ideals had an uncertain impact on the way most ordinary women thought about themselves and marriage. When lobbying the New York Legislature in 1854 to grant a variety of rights to women, Elizabeth Cady Stanton took pains to anticipate and respond to the legislators, who she thought "may say that the mass of the women of this State do not make the demand; it comes from a few sour, disappointed old maids and childless women."[229] Her response is a series of hypotheticals, challenging the legislators to believe that women who were deprived of property, underpaid for physically demanding work, or beaten by drunken husbands would not want greater rights if asked. "For all these, then, we speak."[230] Stanton is careful never to assert that these women *do* want these rights, only that it is inconceivable that they *would not* want them. For, in the end, she was unable to say that women on the whole were clamoring for release from the confines of marriage.

All told, it may be that the preference for separation over divorce lessened as the nineteenth century progressed, as the emphasis on female self-preservation gave way to a desire for individual fulfillment. This latter goal was hard to accomplish through separation.

4. *The relative consequences of separation and divorce.*

Perhaps the piece of research most called for, but not undertaken, by Hartog's book is an in-depth comparison of the relative consequences of separation and divorce. Knowing how the typical wife fared in separation relative to divorce in terms of custody, alimony, child support, and the division of property is essential to understanding why some may have chosen separation over divorce. Unfortunately, the research on this point is piecemeal.

In her study of divorce records between 1815 and 1870, Norma Basch found that legal separation in New York "tended to provide women with far more favorable financial terms than a complete divorce."[231] Separation, she concluded, enabled women to enforce the husband's duty of support by formally continuing the marriage,[232] while alimony "never enjoyed the same fundamental legitimacy."[233] In addition to support, courts could also prevent a

228. *Id.*, Docket No. 22614.

229. Elizabeth Cady Stanton, *Address to the Legislature of the State of New York (Feb. 14, 1854), in* 1 HISTORY OF WOMAN SUFFRAGE, 1848-1861, at 604 (Elizabeth Cady Stanton, Susan B. Anthony & Matilda Joslyn Gage eds., 1883).

230. *Id.*

231. Basch, *supra* note 76, at 10.

232. *Id.*

233. BASCH, *supra* note 21, at 109.

husband's interference with a separated wife's business,[234] although such requests were made only by women who already benefited from some financial independence. In contrast, many women in Basch's study received no financial relief when they obtained divorces.[235]

But perhaps undermining the claim that separation was more beneficial to women is Nancy Cott's contention that in Massachusetts, a legal separation did not restore a woman to feme sole status.[236] A separated wife who is treated as a married woman has the worst of both worlds economically, lacking both her husband's support and the legal status necessary to eke out a living. If her contention is correct, the preference for separation, even formal separation, over divorce becomes more surprising.[237]

Marylynn Salmon also found that some women in the early part of the nineteenth century opted for separation because they fared better under a separate maintenance agreement than a divorce without alimony.[238] But later in the century, alimony was available in most states following an absolute divorce as well as a separation.

In the Alameda County study of divorce at the turn of the century, considerably later than the period studied by Basch and Salmon, alimony was awarded in 7.6% of the cases where the couple had no children, and 15.8% of those with children.[239] When women were awarded custody (which they were 80% of the time),[240] they were also often awarded child support, ranging from 5 to 125 dollars a month.[241] But that study contains no data on separation cases for purposes of making a comparison, and there are no comparable studies of separation. Much more evidence is needed to draw conclusions about the relative benefits of separation over divorce, and whether they lessened throughout the course of the nineteenth century.

An empirical comparison of the separation and divorce rates in particular jurisdictions would add to Hartog's work in an important way. As it is, there are almost no studies of separation. Herman Lantz conducted a study of separation, in which he found 3300 notices of separation in the newspapers of

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234. Basch, *supra* note 76, at 10-11.

235. *Id.* at 13. Nancy Cott found a similar absence of financial support in her analysis of eighteenth-century divorce decrees in Massachusetts. *See* Cott, *supra* note 33, at 610.

236. *See* Cott, *supra* note 33, at 30.

237. Women in such a jurisdiction would fare better by applying for feme sole trader status rather than a separation. *See* note 87 *supra.*

238. SALMON, *supra* note 78, at 67 ("It is interesting to note that when a choice was available [in Pennsylvania after 1815], some women preferred separations with alimony to absolute divorces. Their decision may indicate that they preferred the financial security of a decree of alimony to the right to remarry.").

239. Grossman & Guthrie, *Alameda County Study*, *supra* note 13.

240. *Id.*

241. To put this number in perspective, the average husband's salary in this study was 99 dollars per month.

several states between 1700 and 1800.[242] Nancy Cott, in contrast, found only 220 divorce cases in Massachusetts, a relatively liberal divorce state, in the eighteenth century.[243] A comparison of these two studies might suggest that separation was in fact more common than divorce, although even that limited inference is made difficult by the fact that the studies cover different jurisdictions. Moreover, because divorce was highly restricted in the eighteenth century, many couples may not have had a choice between separation and divorce. The data available do suggest that marital discord was not an invention of the nineteenth century, but that is not Hartog's main point. His inquiry assumes a background level of marital unhappiness and explores the ways in which couples gave effect to their desires for exit. Only an empirical study comparing separation and divorce in the same nineteenth-century jurisdiction would furnish the data necessary to support such an analysis.

5. *Separation and the divorce rate.*

Hartog's study of separation is also important in reconsidering the nineteenth-century divorce reform movement. A central assumption on both sides of the debate about how to reduce the divorce rate has been that strict divorce laws prevent divorce, while loose ones encourage it.[244] Despite statistical evidence to the contrary,[245] anti-divorce reformers insisted that the

242. LANTZ, *supra* note 42, at 15-27, *cited in* DEGLER, *supra* note 165, at 165-66 . Most of these notices were placed by men whose wives had left them, DEGLER, *supra* note 165, at 166, and they had the effect of putting merchants on notice not to extend credit to the separated wives. *See* LANTZ, *supra* note 42, at 17. A notice in the newspaper does not give any indication whether the separation was lawful (i.e., court approved) or unlawful, nor does it confirm an actual separation as opposed to a tactic used to coerce reconciliation or obedience.

243. Cott, *supra* note 236, at 20, *cited in* DEGLER, *supra* note 165, at 165-66 (comparing Lantz's and Cott's findings).

244. *See* Friedman & Percival, *supra* note 36, at 62 (citing the popular view that "[e]asy divorce would loosen the family structure and threaten the death of civilization").

245. Most studies suggest that there is almost no correlation between changes in divorce laws and the divorce rate. *See, e.g.*, ALFRED CAHEN, STATISTICAL ANALYSIS OF AMERICAN DIVORCE (1932) (concluding that social and economic factors, rather than legal changes, exert the primary influences on the divorce rate); James P. Lichtenberger, *Divorce: A Study in Social Causation*, 35 STUD. HIST. ECON. & PUB. L. 339, 11 (1909) (citing WRIGHT, *supra* note 110 and BUREAU OF THE CENSUS DEPARTMENT OF COMMERCE AND LABOR, A SPECIAL REPORT ON MARRIAGE AND DIVORCE, 1867-1906) (concluding that changes in divorce laws were ineffective in influencing the divorce rate); WALTER F. WILLCOX, THE DIVORCE PROBLEM 48-57 (2d ed. 1897) (finding no causal relationship between changes in divorce laws and a state's divorce rate); THEODORE D. WOOLSEY, DIVORCE AND DIVORCE LEGISLATION ESPECIALLY IN THE UNITED STATES (2d ed. 1882) (concluding that the divorce rate was not significantly affected by the type or number of grounds available for divorce, with the possible exception of general omnibus clauses).

easy divorce laws were fueling the rapidly rising number of divorces.[246] "[P]ious men and other conservatives" sought a strict, national law of marriage that would restore strength to Christian ideals about marriage and stop divorce.[247] Pro-divorce reformers operated from the same point. Assuming strict divorce laws were forcing women to stay in oppressive marriages, women's rights advocates pushed for liberalization of divorce laws.[248]

The conventional response to the argument that divorce law was an effective way to control the divorce rate or the rate of marital breakdown is collusion. That is, strict divorce laws do not prevent divorce, but instead require couples to engage in perjury and collusion to obtain it. Many of the movements to liberalize divorce law at the end of the nineteenth century and into the twentieth century were expressly motivated, in fact, by the desire to put an end to the dishonesty and fraud that pervaded the divorce system.[249]

Hartog suggests separation as another response. Hartog's explication of the prevalence and importance of separation undermines the premise that whether couples seek a divorce is a function solely of whether the law makes it available. There are a whole variety of legal and extralegal factors that might have influenced a couple not to seek a divorce, not simply the fact that it was unavailable. He suggests instead that many couples preferred separation whether or not divorce was accessible.[250]

Both the conventional response and Hartog's response are important to our understanding not only of nineteenth-century marriage, but also of modern divorce law. The assumption that law is a precise tool for manipulating the divorce rate did not fade with the close of the nineteenth century, nor the close of the twentieth. The past decade has witnessed its fervent revival, as many

246. *See, e.g.*, PLECK, *supra* note 56, at 60–61 (discussing anti-divorce advocacy). Although the public was outraged about the rising divorce rate toward the end of the nineteenth century, it was relatively low compared to the rate today. It rose from less than two divorces per thousand marriages in 1870 to four per thousand marriages in 1900. *See* COTT, *supra* note 9, at 107.

247. P. 19. The clamoring for a truly federal law of marriage was never successful. But the federal government always tried to implement a strong pro-marriage policy, while deferring to states on the mechanics. *See* COTT, *supra* note 9, at 24, 27–28.

248. Pp. 18-19. Movements to liberalize divorce laws generally were tied to notions of freedom. *See* COTT, *supra* note 9, at 47.

249. *See, e.g.*, Friedman, *supra* note 28, at 666 (noting that the no-fault revolution was precipitated by general recognition that the then-existing system was "a fake"); Richard H. Wels, *New York: The Poor Man's Reno*, 35 CORNELL L.Q. 303, 304 (1950) (quoting from a report by the Association of the Bar of the City of New York that argued for "a liberalization of the divorce laws under proper legal sanctions" in order to "eliminate what has come to be recognized as a scandal, growing out of widespread fraud, perjury, collusion, and connivance which now pervade the dissolution of marriages"); *see also* GLENDON, *supra* note 111, at 63 ("[S]tatutory changes . . . were preceded by a period of widespread evasion of the law through collusion and travel."); JACOB, *supra* note 185, at 148 (noting that a "key argument in favor of no-fault divorce was that it would eliminate fraud and decrease the bitterness of divorce actions").

250. Pp. 37-38, 84-86.

states struggle to control a perceived explosion in the divorce rate.[251] Two states have modified their systems of marriage and divorce, with an eye to reducing the divorce rate.[252] Louisiana, the first to act, adopted a so-called "covenant marriage" system.[253] Under the new laws, couples choose between a "regular" marriage and a "covenant" marriage; the two types of marriages differ at the time of entry and exit. At the time of entry, a covenant marriage requires premarital counseling.[254] At the time of exit, a couple's access to divorce is limited; the concept of "fault" is restored for anyone seeking a divorce immediately, while no-fault is available only for those willing to wait two years, double the wait imposed on "regular" spouses.[255] Arizona's system is similar, though it gives couples an out by providing that the covenant could be dissolved upon mutual agreement of the parties.[256]

The legislative goal of these acts, and the proposals other legislatures considered but did not adopt, is clear: to stem the rising tide of divorce.[257]

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251. Bartlett, *supra* note 36, at 812 (noting the current debate about the significance of marriage: "One prescription urged by reformers is to make divorce more difficult by eliminating no-fault grounds, instituting longer waiting periods, or both.").

252. *See* An Act... Relative to Covenant Marriage, 1997 La. Sess. Law Serv. 1380 (West) (codified at LA. REV. STAT. ANN. §§ 9:272-75, 307-09 (West Supp. 2000)); An Act... Relating to Marriage, 1998 Ariz. Sess. Laws 135, SB 1133.

253. For a thorough analysis of Louisiana's new law and its implications, see Bix, *supra* note 8; Jeanne Louise Carriere, *"It's Déjà Vu All Over Again": The Covenant Marriage Act in Popular Cultural Perception and Legal Reality*, 72 TUL. L. REV. 1701 (1998); DiFonzo, *supra* note 59; Lynne Marie Kohm, *A Comparative Survey of Covenant Marriage Proposals in the United States*, 12 REGENT U.L. REV. 31 (1999/2000); Elizabeth S. Scott, *The Legal Construction of Norms: Social Norms and the Legal Regulation of Marriage*, 86 VA. L. REV. 1901 (2000).

254. LA. REV. STAT. ANN. § 9:273 (A)-(B) (West Supp. 2000).

255. *See* LA. REV. STAT. ANN. § 9:307 (A) (West Supp. 2000).

256. ARIZ. REV. STAT. § 25-903 (2000).

257. *See* David Blankenhorn, *Quickie Divorce: Do We Need It?*, REC. (Northern New Jersey), June 19, 1998, at L11 (commenting on various legislative proposals to reform marriage: "Almost everywhere, the goals of reformers are the same: to lower the divorce rate and to improve marriage."); *Family Life Council to Mark 30 Years*, GREENSBORO NEWS & REC., Aug. 26, 1998, at 7 (commenting on proposals to require premarital counseling: "The ultimate goal is to reduce the divorce rate...."); Gary Heinlein, *Lawmaker Wants to Cut Divorce Rate: Proposal Would Let Couples Enter Into Covenant Marriages*, DETROIT NEWS, Aug. 3, 1998, at D1 ("State Rep. Harold Voorhees said his proposal [for covenant marriage] might help change the fact that more than half of all Michigan marriages don't even last 15 years"); Mike McCloy, *Tougher Wedding Options*, ARIZ. REPUBLIC, May 19, 1998, at A1 (describing supporters' belief that the "voluntary covenant marriage bill.... could further reduce the state's divorce rate"); Virginia Norton, *Divorce a Problem*, AUGUSTA CHRON., at C1 ("Wider use of premarital counseling, covenant marriages and tightening divorce laws could put the brakes on family breakups, say researchers in Georgia and South Carolina."); William Pack, *Accurate U.S. Divorce Figures Hard to Find*, BATON ROUGE ADVOC., Mar. 12, 1998, at B11 (University of Virginia sociologist speculates that "as covenant marriages become more popular, the divorce rate will fall."); *Poor Divorce Solution*, PRESS J. (Vero Beach, Fla.), June 10, 1998, at A14 (commenting on Florida's legislative encouragement for premarital counseling and education: "The idea was to curb the divorce rate...."); *Saving Marriages*, Editorial, INDIANAPOLIS STAR, Aug. 29, 1998, at A16 (commenting on

Other states have enacted less dramatic measures perceived, too, as antidotes to divorce.[258] The Florida legislature recently enacted a provision requiring marriage education in high schools, reduced marriage license fees for couples that receive premarital counseling, and mandatory parenting classes for divorcing parents with minor children.[259] Nebraska and West Virginia passed measures requiring parenting classes for divorcing couples with children.[260] In addition, "community marriage policies" requiring counseling and waiting periods before permitting divorce have been passed by numerous municipalities.[261] What these modern statutes tell us is that lawmakers and commentators continue to overemphasize the role of divorce law in regulating marriages.

C. *Informal Versus Formal Separation*

Asa and Abigail Bailey, like many other husbands and wives, tried to keep their separation informal. They did what many couples did: enter into a written "separation agreement" guaranteeing that their property would be divided in such a way as to support both of them. Hartog uses the Baileys to illustrate a more general preference for informal over formal separations. Although Hartog makes a compelling case that informal separations were common and

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introduction of covenant marriage bill: "Society desperately needs more stable, committed, lasting marriages. The best evidence of that are the soaring rates of divorce . . . ."); Jenifer Warren, *No-Fault Divorce Under Fire in State, Nation*, L.A. TIMES, Apr. 12, 1998, at A1 (describing national movement to end no-fault divorce out of dismay for the "nation's high divorce rate"); Richard Wolf, *States Slow to Plunge into Covenant Marriage*, USA TODAY, June 16, 1998, at 3A (stating that the creation of covenant marriage laws "is a reflection of growing concern over divorce rates, which have been declining slightly since 1981 but remain high enough to affect nearly half of marriages"). *See also* Bartlett, *supra* note 36, at 825 (questioning whether the covenant marriage act's restriction on divorce will have any effect on the rising divorce rate).

258. The reintroduction of fault to the divorce regime, or other structural changes designed to reduce the incidence of divorce, find some support in both conservative and progressive circles. *See* Bartlett, *supra* note 36, at 812 n.7 (cataloguing support from both sides for legal and policy changes designed to reduce incidence of divorce).

259. FLA. STAT. ch. 232.246(3)(i) (2000) (marriage education); FLA. STAT. ch. 741.0305(1) (2000) (reduced fees); FLA. STAT. ch. 61.21 (2000) (parenting classes).

260. *See* NEB. REV. STAT. § 42-349.01 (2000); W. VA. CODE § 48-11-104 (2000).

261. For example, the affianced in Lenawee County who wish to be married by any magistrate, judge, or public official have to complete prenuptial counseling in addition to paying the $20 marriage license fee charged in all other Michigan counties. Dee-Ann Durbin, *Hear Ye! Judges Require Premarital Counseling, But Couples Don't Want to Listen*, GRAND RAPIDS PRESS, June 8, 1998, at B4; Bonnie Miller Rubin, *Training to Tie the Knot*, CHI. TRIB., July 6, 1997, at C1. The Missouri legislature recently considered a proposal to erect a "Marriage Restoration Fund," offering $1,000 to couples over twenty-one who get married and are able to certify that the woman has not had an abortion, neither partner has had a sexually transmitted disease, neither has a child, and neither has been previously married. Kim Bell, *Law Would Give Missourians $1,000 to Wed, Strings Attached*, ST. LOUIS POST-DISPATCH, Mar. 13, 1998, at A1.

postulates some plausible reasons for such a preference, the explanations are not completely satisfying.

Informal separations were surely less public, and could often be explained (truthfully or not) under the guise of the husband's search for land or work or even his death.[262] But informal separations were an imperfect remedy for women. Although they undoubtedly functioned in some cases to protect reputations, honor religious mandates, or stave off immediate physical danger, they provided little or no financial security—an admittedly important aspect of female self-preservation.[263]

An informally separated wife did not have the rights of a single woman. Her identity was covered over by her husband's, as it would have been if they had continued to live together. Although many couples relied on separation agreements to allow the wife to own property and function independently, the doctrine of coverture made such agreements "patently unlawful."[264] With Lord Kenyon's decision in *Marshall v. Rutton*,[265] holding separation agreements invalid, and its wholesale adoption by American courts, American women reaped no financial security from a separate maintenance agreement. Yet many wives continued to informally separate from their husbands and to enter into such agreements.[266]

Maybe psychological theory can explain why spouses continued to enter into contracts they knew to be unenforceable. Elizabeth Scott has applied precommitment theory in the context of divorce, contending that couples who contractually agree to reduce their access to divorce will be less likely to want one; such agreed restrictions "enable the individual to adhere to the initial utility-maximizing plan."[267] That same theory might explain nineteenth-century couples who entered into unenforceable separation agreements. There may also have been extralegal consequences affecting reputation, religious or moral purity, or trustworthiness in private enterprise that influenced some men to honor their agreements.

Hartog suggests that the act of contracting with one's husband was undoubtedly "transformative and regenerative, as a way to assert possession of an individual self capable of acting in and on the world."[268] But that explanation seems inadequate to explain why women would rely on voluntary separations in the first place, with all the uncertainty they promised. Surely the

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262. *See* P. 57.

263. Of course, even court-ordered support did not guarantee security. By all accounts, compliance rates for alimony and child-support in the nineteenth century were low. And many women did not receive orders of support in the first instance.

264. P. 57. *See also* text accompanying notes 140-148 *supra*.

265. 8 T.R. 545 101 Eng. Rep. 1538 (K.B. 1800).

266. P. 83. *See also* SALMON, *supra* note 78, at 59.

267. Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 VA. L. REV. 9, 42 (1990).

268. P. 85.

act of filing for separation or divorce—and winning—would be similarly "transformative and regenerative." But if Hartog is right that the perceived alternative to a contractual separation was not divorce but "simple abandonment,"[269] then the proliferation of separation agreements may make more sense. Some protection is better than none.

Without the benefit of an enforceable separation agreement, or the legal right to operate as a feme sole,[270] informally separated women lacked the basic ability to function independently and support themselves. The Married Women's Property Acts eventually came to restore that ability to married—and separated—women.[271] Whether these acts had any effect on the total rate of separation or the ratio of informal to formal separations would be valuable to this analysis.

Hartog also contends that cost was a deterrent to seeking legal process,[272] but more evidence of its significance is needed. How costly was it to obtain a legal separation or divorce? The Alameda County study of divorce suggests that the typical divorce at the turn of the century cost seventy-six dollars—about three-quarters of an average defendant-husband's monthly salary. Separations from bed and board were no doubt comparably costly. But that figure does not account for legal representation, and in that study, two-thirds of the plaintiffs were represented by lawyers. This may have been prohibitively costly. But Norma Basch reports that many states in the 1820s and 1830s specifically addressed the inability of the poor to afford divorce with statutes waiving fees for the impoverished and sometimes for women.[273] And by the end of the nineteenth century, divorce seekers, in fact, came from all walks of life.[274]

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269. P. 84. The line between "simple abandonment" and divorce is difficult to discern. In many jurisdictions, abandonment was the most common ground for divorce. *See, e.g.*, Petrik, *supra* note 167, at 155 (finding that two-thirds of all divorces recorded in one Wyoming county between 1869 and 1900 were premised on desertion, typically by men); *see also* Grossman & Guthrie, *Alameda County Study*, *supra* note 13 (finding that desertion was the most common ground for divorce in Alameda County between 1890 and 1910, comprising 40% of all divorce petitions).

270. *See* note 87 *supra*.

271. *See* text accompanying notes 61-62, 79-80, 106 *supra*.

272. P. 84; *see also* PETER W. BARDAGLIO, RECONSTRUCTING THE HOUSEHOLD: FAMILIES, SEX, AND THE LAW IN THE NINETEENTH-CENTURY SOUTH 34 (1995) (arguing that couples in the South separated without the benefit of a legal decree because "[f]ew poor whites and free blacks had the resources or time to pursue a divorce"); Friedman, *supra* note 28, at 663 ("Even an ordinary, collusive divorce cost money . . . ."); Friedman & Percival, *supra* note 36, at 77 ("Divorce was costly; ordinary people used desertion, infidelity, and informal cohabitation to get around an inconvenient marriage.").

273. BASCH, *supra* note 21, at 53-55.

274. GRISWOLD, *supra* note 18, at 25 (finding that 66% of couples in divorce court could be characterized below "middle class"); Grossman & Guthrie, *Alameda County Study*, *supra* note 13 (finding that 77% of couples in divorce court were tradesman, farmers, or laborers).

Another plausible explanation for the preference for informal separation is that legal process may have been particularly inaccessible to women. Hartog's description early in the book of law as a uniquely male domain may shed light on women's preference for informal, albeit unreliable, separations. Throughout the nineteenth century, judges and lawyers were almost exclusively male.[275] And as Norma Basch has explained, the process of formally dissolving a marriage

> imposed particular burdens on female plaintiffs. A woman subjected the intimate details of her marriage to the scrutiny of an all-male judiciary, and while the text of the divorce focused on her husband's guilt, the subtext revolved around her own impeccable innocence. Surely, when they balanced the value of the remedy against its psychic and economic costs, countless women opted for simpler, cheaper, extralegal alternatives.[276]

To explain the prevalence of informal separations, Hartog also reinvokes the explanation that many women living apart from their husbands still preferred to be married, but living apart, than divorced. But that explanation, while useful to explain the preference for separation over divorce, is not probative of why women chose informal over formal separations. In the nineteenth century, myriad legal rights flowed from the determination that a woman was legally entitled to separate—something that only occurred when a court decreed it. Without a formal separation, women living apart from their husbands had no right to their support[277] and no right to the custody of their children.[278]

This preference for informal separation is also hard to reconcile with Lawrence Friedman's explanation for the rise in divorce at the end of the nineteenth century. He contends that in the nineteenth century, "[a]bsolute divorce tended to replace separation," because people with broken marriages wanted divorce as a *legal* status, for economic reasons, connected with property

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275. Pp. 11-23.

276. Basch, *supra* note 76, at 15.

277. P. 158.

278. Pp. 204, 212. By the turn of the twentieth century, courts freely gave divorcing wives custody of their children. GRISWOLD, *supra* note 18, at 153 (finding that "female petitioners received custody in 91 percent of their suits, men in just 37 percent"); MAY, *supra* note 40, at 173 (finding that wives were almost always granted custody in study of New Jersey and California divorce cases between 1880 and 1920); Grossman & Guthrie, *Alameda County Study*, *supra* note 13. But even earlier in the century, custody was sometimes granted to women following divorce. *See generally* GROSSBERG, *supra* note 8, at 281-85 (describing evolution of custody law in the nineteenth century away from presumptive paternal custody); MASON, *supra* note 177, at xiii (describing nineteenth-century shift "away from fathers' common law rights to custody and control of their children toward a modern emphasis on the best interests of the child, with a presumption in favor of mothers as the more nurturing parent"). But without a divorce, courts required wives to justify their separation. If it was found to be unlawful, custody could not be awarded to the wife.

rights."[279] Divorce not only legitimizes remarriage, but changes inheritance rights and clarifies title to real property.[280] Although this explanation was offered to explain divorce over separation, it might also support a preference for formal over informal separation.

III. STATUS THREE: SEPARATED OR DIVORCED (BUT NOT SINGLE)

Hartog's analysis of separation is also important to understanding the importance of marriage—and remarriage—to nineteenth-century couples. The pervasiveness of separation and divorce in the nineteenth century does not indicate that the ideal of marriage had been discarded. To the contrary, men and women, he contends, wanted to be married—so much so that if their first attempts were unsuccessful, they wanted to try again. Reconsidered in that light, the demand for separation or divorce becomes important more as a pathway to marriage than an exit from it.

A. *The Importance and Desirability of Marriage*

Though the law of marriage was developed in the context of marital failure and dissolution, marriage itself remained an important public value.[281] It played a prime role not only in how men and women structured their lives, but also in prevailing theories of community governance. Eighteenth-century republican ideology emphasized the role of the family in inculcating civic virtue: Women were charged with the task of preparing their sons for participation in political and public life.[282] Men gained credibility in the public and political arena through marriage. As Hartog explains:

> [A] man's identity and his honor were deeply tied to his marital status. Being a householder, being someone who cared for and controlled a family, gave a man political significance. It was a foundation for republican political virtue. As the caretaker of a wife, children, and servants, a man became the sovereign

279. Friedman, *supra* note 28, at 655.

280. The "dramatic changes in divorce law in the early nineteenth century lend themselves to a standard kind of economic explanation based on property interests, the demands of a broad-based, active land market, the need for clear titles, and for devolution and disposition of property along rational lines." *Id.* Many explain the Married Women's Property Acts in similar terms. *See* note 61 *supra.*

281. Interestingly, although today there is arguably less of an emphasis on the importance of marriage, the marriage rate is comparable to that in the late nineteenth century. *See generally* ANDREW J. CHERLIN, MARRIAGE, DIVORCE, REMARRIAGE (rev. ed. 1992).

282. *See* LINDA K. KERBER, WOMEN OF THE REPUBLIC: INTELLECT AND IDEOLOGY IN REVOLUTIONARY AMERICA 229 (1980) ("[T]heorists created a mother who had a political purpose and argued that her domestic behavior had a direct political function in the Republic."); *see also* HOFF, *supra* note 61, at 79.

> of a domain, able to meet with other rulers and to participate with them in government.[283]

For men, marriage was also intertwined with citizenship; the qualities that made men good husbands and fathers were thought to make them good candidates for citizenship.[284] In a similar vein, the right to assume the responsibilities of marriage and fatherhood was linked, for ex-slaves, with freedom.[285]

Unlike the preceding centuries, when families were openly premised on male patriarchy and female subordination,[286] nineteenth-century husbands and wives had expectations of "love, affection, and mutuality."[287] Robert Griswold contends that the second half of the century witnessed the

> full flowering of the companionate ideal, an ideal predicated on the notion of domestic equality between husbands and wives. . . . [They saw] the arrival of family relations grounded in a partnership between husbands and wives who, although working in different spheres, owed each other mutual deference, respect, kindness, and love.[288]

William O'Neill argues that affection and emotional intimacy became central to nineteenth-century marriage.[289] The changing nature of the family, in turn, put increased pressure on the divorce system because when "families become the center of social organization, their intimacy can become suffocating, their demands unbearable, and their expectations too high to be easily realizable."[290] Higher expectations for marriage at once put greater

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283. P. 101.

284. *See* COTT, *supra* note 9, at 142 (discussing Theodore Roosevelt's belief that "home virtues" were related to civic virtue for men).

285. *Id.* at 94.

286. *See generally* NANCY F. COTT, THE BONDS OF WOMANHOOD: "WOMAN'S SPHERE" IN NEW ENGLAND, 1780-1835, at 5–9 (1977); GRISWOLD, *supra* note 18, at 9 (noting that the "evidence suggests that eighteenth-century women occupied a subordinate position in the family and in society"); Cott, *supra* note 33.

287. GRISWOLD, *supra* note 18, at 3; *see also* COTT, *supra* note 9, at 150 (noting that turn-of-the-century Americans "were very much committed to marriage founded on love").

288. *Id.* at 5; Friedman & Percival, *supra* note 36, at 78 (noting that by the turn of the century, "a wife was to be more than sex partner, servant, and nursemaid; a husband was to be more than a breadwinner and protector"). Theoretical and prescriptive literature supports this characterization of marriage, as do upper-class memoirs. *See generally* DEGLER, *supra* note 165; GRISWOLD, *supra* note 18, at 2. Whether the companionate ideal reached beyond the elite is not clear. Robert Griswold concluded based on divorce records between 1850 and 1890 that "men and women from all social classes conceived of family relations in affective terms, [and] placed a premium on emotional fulfillment in the family . . . ." GRISWOLD, *supra* note 18, at 5. *But see* Petrik, *supra* note 167, at 181 (concluding based on divorce records that the concept of companionate marriage was more prevalent among the "veteran middle class" rather than the soon-to-be middle class).

289. *See* O'NEILL, *supra* note 185, at 6-7. Reva Siegel argues that the rhetoric of the companionate ideal made it difficult for courts to recognize an express right of chastisement, but permitted them to rationalize the same result by adverting to the need for marital privacy that accompanied the new ideal. *See* Siegel, *Rule of Love*, *supra* note 12, at 2152.

290. *Id* at 6. *See also* Friedman, *supra* note 28, at 657-58 ("[D]ivorce thrives under

pressure on the law for easy exits and made marriage—and remarriage—appealing. A truly companionate marriage was worth more effort to find than its seventeenth- or eighteenth-century counterpart.

But men and women were not affected the same way by marriage, and the explanation for their desire to marry therefore must differ. For nineteenth-century men, like their seventeenth- and eighteenth-century counterparts, the desire to be married can be explained by remembering

> how important being married was in nineteenth-century America: important in terms of the labor of maintaining a household, important as a public matter of being recognized as a competent (male) adult, important as a defense against the emotional isolation that always threatened in mobile America.[291]

Staying married was also important to men, as separation or divorce undermined their status.[292]

Women's acquiescence to marriage is somewhat harder to explain. Why, Hartog asks, did women willingly enter into a state of inferiority and legally imposed disability? As early as 1848, when the first mobilized women's rights activists convened in Seneca Falls, marriage and its accompanying disabilities became a feminist target. In describing "a history of repeated injuries and usurpations on the part of man toward woman," the convention's participants included the following complaint:

> He has made her, if married, in the eye of the law, civilly dead.
>
> He has taken from her all right in property, even to the wages she earns .. . .
>
> . . . In the covenant of marriage, she is compelled to promise obedience to her husband, he becoming, to all intents and purposes, her master—the law giving him power to deprive her of her liberty, and to administer chastisement.
>
> He has so framed the laws of divorce, as to what shall be the proper causes, and in case of separation, to whom the guardianship of the children shall be given, as to be wholly regardless of the happiness of women—the law, in all cases, going upon a false supposition of the supremacy of man, and giving all power into his hands.[293]

Better economic opportunities for women working outside the home make women's acquiescence to marriage even harder to explain.[294] Single women had always fared better in terms of property rights. But the position of single women became more enviable as they gained greater opportunities to generate wealth, as opposed to just protect or manage existing wealth. Walter Willcox

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conditions in which people expect a lot out of marriage . . . .").

291. P. 22.

292. Pp. 100-01.

293. *Declaration of Sentiments*, *supra* note 82; *see also* HOFF, *supra* note 61, at 136 (concluding that the attack on "modern marriage" was one of the few aspects of the Seneca Falls convention that had "lasting significance").

294. *Cf.* COTT, *supra* note 286, at 6 (describing the 1830s as a "turning point in women's economic participation"); Friedman & Percival, *supra* note 36, at 78 (noting the greater presence of women in the workforce).

argued in 1897 that the growing number of women entering the economy lessened their dependence and therefore their marital ties.[295]

In divorce court, men brought more claims of abandonment than anything else, suggesting that some women had the ability to leave, presumably with some plan for support.[296] Abandonment cases sometimes revealed the husband's frustration with fact that wives had left, often to pursue a career of some kind. Emma Sutter's husband, for example, filed for divorce after she left for New York to seek her fame on the stage.[297] Frederick Jones secured a divorce on abandonment grounds after he moved from Kansas to California and his wife refused to accompany him.[298]

Economic opportunities may well have had a marginal impact on the willingness of women to leave a bad marriage—or to decide against marrying in the first instance. But even by the end of the century, there had been little progress in dismantling the near universal belief in separate spheres—the idea that women's place was in the home and men's in the public, commercial world. For at least six decades into the twentieth century, in fact, courts relied on the separate spheres as the defining natural order to explain prohibitions on women's serving on juries, working as bartenders, working long hours, and practicing law.[299]

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295. WILLCOX, *supra* note 245, at 67 ("So far as the training of the two sexes prior to the marriage has been identical, one or the other must be ill fitted for that life; so far as women's work has become masculine, her ability to make and keep a home happy is diminished."); *see also* Friedman & Percival, *supra* note 36, at 78 ("The feminist movement no doubt also affected the law of marriage and divorce. Between 1870 and 1930, too, the percentage of women in the labor force nearly doubled.").

296. WRIGHT, *supra* note 110, at 444-601 (reporting that nationwide men sought divorce based on abandonment more than any other ground); Grossman & Guthrie, *Alameda County Study*, *supra* note 13 (reporting same, in Alameda County). *See also* Basch, *supra* note 76, at 16 (arguing that abandonment by women is a better indication of their autonomy than filing for divorce).

297. *See Gave Up Her Home to Shine on the Stage*, OAKLAND TRIB., Jan. 2, 1900, at 8.

298. Grossman & Guthrie, *Alameda County Study*, *supra* note 13, Docket No. 14942.

299. *See* Hoyt v. Florida, 368 U.S. 57 (1961) (holding that a state may require women, but not men, to affirmatively register in order to be considered for jury service because of their domestic responsibilities); Goesaert v. Cleary, 335 U.S. 464, 466 (1948) (upholding a prohibition on women serving as bartenders because of the special "moral and social problems" it may cause); Muller v. Oregon, 208 U.S. 412, 421 (1908) (upholding an Oregon law that forbid female, but not male, employees of a laundry establishment from working more than ten hours per day because "by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to [have] injurious effects upon the body, and as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race."); Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring) (permitting a state to refuse to allow women to practice law in part because lawyering would be inconsistent with "the paramount destiny and mission of woman [] to fulfil the noble and benign offices of wife and mother").

B. *Law's Protection of Marriage*

The era of divorce substituted a paradigm of serial monogamy, rather than one modeled on free love or singledom, for the waning ideal of a single, lifelong marriage.[300] The ability to marry and remarry is what ordinary men and women wanted, and courts gave expression to those wishes. Hartog's analysis suggests a role for nineteenth-century courts as marriage-savers—not necessarily to protect first marriages, or any particular marriage, but marriage in general.

The nineteenth-century appellate reporters are replete with sweeping pronouncements about the value of marriage and its importance to society. Marriage, the Supreme Court warned, "is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress."[301] The Court's lauding of marriage was not tied to the idea that marriages must be lifelong, for this pronouncement came as the Court sanctioned a husband's reprehensible conduct toward his first wife and family in order to clear a path for a second marriage.[302] Other courts expressed similar reverence for marriage.[303]

As Hartog demonstrates, the marriage-saving function was implicated in several types of cases. In suits to enforce separate maintenance agreements, for example, courts refrained from enforcing them in part because of concerns about disrupting marital unity. He questions the invocation of that principle,

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300. P. 249. A few feminists rejected this paradigm. Victoria Woodhull, for example, declared a "war upon marriage," and advocated for short-term, free, and changeable love. BARBARA GOLDSMITH, OTHER POWERS: THE AGE OF SUFFRAGE, SPIRITUALISM, AND THE SCANDALOUS VICTORIA WOODHULL 274 (1998); *see also* COTT, *supra* note 9, at 68–72 (discussing the emergence of the "free love" radicals in the middle of the century); Babcock, *supra* note 84, at 1700 n.51 (collecting biographical sources about "free lover" Victoria Woodhull).

301. Maynard v. Hill, 125 U.S. 190, 211 (1888); *see also* Randall v. Kreiger, 90 U.S. (23 Wall.) 137, 147 (1874) (Marriage "is the most important transaction of life. The happiness of those who assume its ties usually depends upon it more than upon anything else. An eminent writer has said it is the basis of the entire fabric of all civilized society.").

302. *See* DiFonzo, *supra* note 59, at 876 n.6 (pointing out the lack of congruence between the marriage before the Court and the Court's view of marriage as an institution).

303. Powell v. Powell, 1 So. 549, 549-550 (1887) ("The institution of marriage, established by divine, and perpetuated and guarded by human authority, constitutes the foundation of organized society, protects private and public morality and virtue, and moulds the character of the citizens of the commonwealth."). Other state Supreme Courts regarded marriage with similar reverence. *See, e.g.*, Burdette v. Burdette, 2 Mackey 469, 471 (D.C. 1883) ("[T]he preservation of [the] fundamental institution of marriage is even more important to society than the punishment of its criminals . . . ."); Head v. Head, 2 Ga. 191, 198 (1847) ("Upon the intangible sanctity, and almost indissoluble integrity of the marriage contract, depends the character and happiness of our population, the perpetuity of our institutions, the peace of our homes, and all the charities of social life.").

particularly when the marriages before such courts were so clearly defunct.[304] But by refusing to enforce private agreements, courts jeopardized the stability of informal separations. Without that stability, some women might have been forced to reunite, and renegotiate, in order to survive. Without enforceable rights to property, earnings, and children, women were given an incentive to try their hand at marriage again—with an existing or a subsequent spouse.

Courts' treatment of bigamy cases also fits within this theory. [305] Both judges and the statutory law they were interpreting gave some protection to bigamous marriages if they were viable. In one common scenario, a husband would leave his wife and she, without securing a divorce, would eventually remarry. As a matter of law (in almost every jurisdiction), the second husband was entitled to an annulment on grounds of bigamy, while the first was entitled to a divorce based on adultery. Where the second husband in this type of scenario actually sought an annulment, he was generally successful.[306] But where the first husband tried to invalidate the second marriage, courts were less likely to strike down the bigamous marriage. Courts sometimes relied on evidentiary presumptions or willful blindness to ignore the bigamy,[307] while state statutes limited the circumstances in which a second marriage was considered bigamous. New York law, in fact, made bigamous marriages voidable rather than void if the first husband had been gone for five years.[308] The effect of that characterization was to protect the subsequent, bigamous marriage as long as it was viable—that is, the second husband was not seeking to avoid it (though he had the right).[309] Thus a pattern is revealed where courts overlook an obvious offense—bigamy—in order to preserve a viable marriage.[310]

Other nineteenth-century laws reflected a similar deference to viable marriages. Maine, for example, provided that a decree of divorce or alimony

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304. Pp. 82-83.

305. On nineteenth-century bigamy and its relation to American mobility, see Friedman, *supra* note 152.

306. *See* Grossman & Guthrie, *supra* note 210, at 314.

307. *See* Pp. 254-55. Bigamy, by many accounts, was common in the nineteenth century. *See, e.g.*, Timothy J. Gilfoyle, *The Hearts of Nineteenth-Century Men: Bigamy and Working-Class Marriage in New York City, 1800-1890*, 19 PROSPECTS 135, 141 (asserting that many men "treated bigamy as an informal means of common-law divorce").

308. Pp. 88, 257-58. *See also* N.Y. DOM. REL. LAW art. I, § 6 (Banks 1889).

309. Bigamy, then and now, typically renders a marriage void rather than voidable. By making it voidable (and thus valid if both parties wish it to be), the legislature gave added protection to marriage by giving the couple discretion to decide whether to invalidate it.

310. Hartog suggests that courts could react less severely to bigamy than to collusion or illegal separations, because, as long as the second marriage appeared normal, it did not threaten the "public structure" of marriage. Pp. 89-91. That distinction is somewhat unsatisfying, as many collusive divorces were not obviously so, and illegal separations were often explained away by false reports of a spouse's death. Law's legitimacy is arguably affected more by the particular circumstances of a couple than by whether it involved bigamy, collusion, or an unlawful separation.

could be reheard on petition of either party within three years unless either party had remarried.[311] Legal limitations on the right of remarriage also began to disappear. Some statutes that precluded adulterous spouses from remarrying during the lifetime of the aggrieved spouse, for example, were repealed.[312]

The widespread recognition of common law marriage in the nineteenth century may also be implicated in the pro-marriage principle. By giving the name "marriage" to describe committed, but informal relationships, legislatures may have been trying to superimpose an accepted relationship over an unacceptable one.[313]

Hartog's conclusions are consistent with Nancy Cott's about the law's protection of marriage. She reports that juries tended to be lenient in bigamy cases where the defendant was justified in leaving the first marriage.[314] Judges, she argues, tended to indulge a presumption in favor of marriage, reflecting in part a shared public policy to foster monogamous marriage.[315] Even legislatures, in moving to liberalize divorce laws, were supporting marriage. "In altering the terms of marriage, legislators saw themselves as not interrupting but polishing, refining, and perfecting an ongoing institution."[316]

With respect to the sanctity of marriage, Hartog provides a new wrinkle on a common tale. As the nineteenth century progressed and, particularly as it gave way to the twentieth, men and women insisted on easier access to separation and divorce, but in so doing, they were really enforcing their rights to marital happiness—in the next marriage.[317] For most, remarriage rather than

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311. ME. REV. STAT. ch. 60, § 9 (1871).

312. *Compare* N.Y. DOM. REL. LAW ch. 8, § 53 (Gould 1852) (providing that a defendant to a divorce based on adultery may not remarry during the lifetime of the complainant) *with* N.Y. DOM. REL. LAW ch. 8 § 49 (Banks 1889) (permitting an adulterous spouse to remarry where the innocent spouse has remarried, five years has elapsed since the decree of divorce, and "the conduct of the defendant since the dissolution of [the] marriage has been uniformly good").

313. *See* Dubler, *supra* note 8, at 1896 (noting ambiguity in determining whether recognition of common law marriage was a validation of nontraditional relationships or an attempt to circumscribe them within conventional boundaries); Dubler, *supra* note 25, at 969 (arguing that by recognizing common law marriage, "courts reinforced the supremacy of the institution of marriage by demonstrating that it could subsume under its aegis almost all long-term domestic forms of ordering"). This may be one example of what Hartog describes in an earlier article as the "sometimes successful efforts of judges and other legal authorities to reimpose predictable and generalized legal order on those individual lives." Hartog, *supra* note 6, at 98.

314. COTT, *supra* note 9, at 38.

315. *Id.* at 39.

316. *Id.* at 47.

317. P. 286. *See also* Friedman, *supra* note 28, at 658 ("[T]he immorality of divorce depends on the sacredness of marriage, but this can only increase the demand for divorce—to legitimate any second arrangement . . . ."); Friedman & Percival, *supra* note 36, at 78 (describing the demand for divorce at the end of the nineteenth century as a "demand for *legitimization of status* . . . . Men and women who had left their old partners wanted to form new families, have children, live normal economic and social lives.").

the single life was the goal, and couples began to assume they had a right to remarry.[318]

CONCLUSION

Man and Wife in America is a tremendous accomplishment that adds to the history of marriage in important ways. Hartog's most significant contribution is his account of the importance of separation as a status and to the development of the law of marriage. It is through separation that Hartog accomplishes his goal of understanding nineteenth-century husbands and wives and the choices they made within the governing legal regime.

Hartog emphasizes the importance of traditional aspects of marriage like unity and standardization, but argues that marital role expectations were not as rigid as formal law suggests. Coverture, he contends, was rarely enforced to the letter, bending instead to accommodate the practical needs of separated wives. He gives persuasive examples of this effect, though he sometimes overlooks the consequences of strict, formal law on women's claims to equality and the degree to which new rules perpetuated old systems of oppression.

Hartog also uses separation to draw a more accurate picture of marital exit and reentry. The newfound mobility of the nineteenth century fundamentally altered the playing field for married couples by creating new opportunities for, and new forms of, exit. This mobility facilitated informal exits from marriage—like simple abandonment and consensual separation—and entry into sometimes bigamous remarriages. Informal exits have been underemphasized in the conventional account of nineteenth-century marriage in favor of the traditional marriage-divorce dichotomy, a narrow approach that insufficiently captures the range of ways married couples expressed their marital dissatisfaction in the nineteenth century.

Separation, like divorce, annulment, or death, was one of the options for marital exit. Hartog's central point is that separation, rather than divorce, was the desired end for many couples. And informal separation was often preferred over formal separation. These claims raise important questions about why couples utilized different options for exit and the consequences of those decisions. Existing studies, however, do not answer these questions. Studies showing, in concrete terms, the relative advantages and disadvantages of separation versus divorce and informal versus formal separation would add support to his claims. Why, for example, did women desire, or accede to, informal separation when it gave them little or no protection?

He also reconsiders the relationship between law and the institution of marriage, findings ways to reconcile the continuing ideal of permanence with the increasing demand for marital dissolution. Courts and individuals had such respect for marriage that they looked for ways to allow exit from bad marriages

318. P. 283.

in order to clear the way for reentry into better ones. But the question of why women continued to embrace the often oppressive institution of marriage when they increasingly had the ability to support themselves due to new legal rights and greater economic opportunities is worthy of further consideration.

In the end, Hartog has effectively refocused the history of marriage to look more closely at separation, constructing a convincing account of the demonstrable ways in which separation made law and law accommodated separation. Hartog has not only laid a solid groundwork for future research based on these insights, but also has made significant headway toward answering the important questions he raises.